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Efficiency of the English criminal courts in a time of austerity. Exploring courtroom lawyers' assessment of government policy (2010-2017)

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Abstract

Against the background of financial cuts this thesis examines the effects of the measures pursued by the government to improve the efficiency of the English criminal courts and the English and Welsh Criminal Justice System (EWCJS). An initial examination of governmental, ministerial, and departmental publications was pursued to understand what concepts of efficiency the government and its agencies were employing in the quest to attain greater efficiency. The thesis attempts to establish how successful the efficiency programmes have been to date, by in depth questioning of legal practitioners who have direct, first-hand experience of those programmes in action. Like the curates egg, the government's pursuit of efficiency has been good in parts, according to its own criteria of success. However, the efficiency measures have proved to be detrimental to the maintenance of other important values and aims of the legal system, such as justice and fair process.

CONTENTS

Abstract	ii
Chapter Contents	iii
List of Appendices	vi
List of abbreviations	vii
Acknowledgements	ix

Chapter One- Introduction

1.1	Purpose and Background	1
1.2	Overview of Chapters	3
1.3	Practitioner Researcher	6

Chapter Two-Background

2.1	Background	8
2.2	Financial Cuts and Spending Reviews	9
2.3	Cuts and / or Efficiencies	13
2.4	Efficiency Concepts	14
	2.4.1 Technical	15
	2.4.2 Productive	15
	2.4.3 Dynamic	18
	2.4.4 Allocative	18
	2.4.5 Pareto	19
2.5	Simple Examples of the application of productive and technical efficiency in the Criminal Justice System	21
	2.5.1 Legal Aid	21
	2.5.2 Probation	24
	2.5.3 Efficiency in the Court Process	25
2.6	Leveson Report	28
2.7	Changes in government and personnel	28

Chapter Three-The US: Efficiency and the Courts

3.1	Introduction	33
3.2	US Genesis	33
3.3	Efficiency and Effectiveness	36
3.4	US Efficiency: the new Penology, Plea Bargaining, and the demise of Rehabilitation	42
3.5	Critique	47

Chapter Four- Efficiency and the Courts: England and Wales	52
4.1 Introduction	52
4.2 UK Recent Experience	53
4.3 UK New Public Management Legacy	57
4.4 Efficiency and Justice	61
4.5 Court Crisis	64
4.6 Lord Leveson and the National Audit Office	71
4.7 Summary and Conclusion	74
 Chapter Five-Methodology	 77
5.1 Introduction	77
5.2 Philosophy of the Endeavour	77
5.3 Sampling Strategy	81
5.4 Insider and Outsider revisited	84
5.5 Qualitative Research	91
5.6 Semi Structured Interviews	95
5.7 Ethical Clearance	100
5.8 Gaining Access and Ethics	105
5.9 Transcription	107
5.10 Thematic Analysis	109
 Chapter Six-Findings	 113
6.1 Introduction	113
6.2 Findings	113
6.2.1 A no adjournment culture	113
6.2.2 Courts speedier / more efficient?	116
6.2.3 Concern over Transforming Summary Justice (TSJ)	118
6.2.4 Injustice for Prosecution	120
6.2.5 Police Injustice	126
6.2.6 Injustice for the defence	131
6.2.7 An Elephant in the Room	134
6.2.8 Morale	138
6.2.9 Early liaison between prosecutor and defender, and a seamless process	142
6.3 Summary	145

Chapter Seven-Are the Criteria of Efficiency Satisfied?	148
7.1 Introduction	148
7.2 Delay, Getting it right First Time, and other criteria of efficiency	150
7.3 The House of Commons Public Accounts Committee, and a new concept of Efficiency	158
 Chapter Eight-Efficiency and Three Important Bodies	 167
8.1 Introduction	167
8.2 The Central Position of the CPS	167
8.3 Probation: NPM in concrete operation	176
8.3.1 Introduction	176
8.3.2 Understaffed	178
8.3.3 Standard of reports	180
8.3.4 12 Month Supervision	181
8.3.5 Breaching	182
8.4 Viable Legal Professions	184
8.5 Conclusion	189
 Chapter Nine-Allocative Efficiency and the Raison d'être of the Justice System	 192
9.1 Introduction	192
9.2 NPM and Allocative Efficiency	192
9.3 Justice	198
9.3.1 Justice and Victims	198
9.3.2 The Professions and Justice	201
9.3.3 Justice and Legal Aid	204
9.3.4 Justice and Delay	206
9.4 Transforming the CJS: Strategy and Action Plan 2013	208
9.5 Rule of Law	210
 Chapter Ten-Conclusion	 214

References	219
Appendices	245
Appendix A: Allocative Efficiency	246
Appendix B: Legal aid spending per capita	248
Appendix C: Annual public budget allocated to courts, prosecution and legal aid per capita	249
Appendix D: The Stress between Criminalisation and streamlining in the CJS	250
Appendix E: Lawyer Professional identity	253
Appendix F: Original Interview Schedule	258
Appendix G: Ethics Approval Letter	262
Appendix H: Choice of Lawyers as Participants	263
Appendix I: Introductory Letter	264
Appendix J: Participant Information Sheet	266
Appendix K: Consent Form	271
Appendix L: Listing to Completion Times	273
Appendix M: Waiting time in the Crown Court	275
Appendix N: The Concept of Delay	276
Appendix O: Disclosure Developments	279

Total words in the submitted Thesis (excluding references and appendices) 59,964

List of abbreviations

AC	Average Cost
ADR	Alternative Dispute Resolution
AO	Actual Output
CJB	Criminal Justice Board
CJS	Criminal Justice System
CPS	Crown Prosecution Service
CRC	Community Rehabilitation Companies
DCS	Digital Case Management
DPP	Director of Public Prosecutions
EWCS	English and Welsh Criminal Justice System
EGP	Early Guilty Plea
FE	Functional efficiency
FI	Functional inefficiency
FO	Functional Output
HC	House of Commons
HCA	Higher Court Advocate
HMCPIS	Her Majesty's Crown Prosecution Service Inspectorate
HMCTS	Her Majesty's Court and Tribunal Service
IDPC	Initial Details of Prosecution Case
IL	Irreducible Level
LAA	Legal Aid Agency
MC	Marginal Cost
MOJ	Ministry of Justice
NAO	National Audit Office
NCSC	National Centre for State Courts
NFS	National File Standard

NPM	New Public Management
NPS	National Probation Service
PAC	Public Accounts Committee
PbR	Payment by Results
PCMH	Plea and Case Management Hearing
PPF	Production Possibility Frontier
PSR	Pre-Sentence Report
PTPH	Plea and Trial Preparation Hearing
TCJS	Transforming Criminal Summary Justice
TSJ	Transforming Summary Justice
TJ	Transforming Justice
WF	Work Force
WPSS	White Paper Swift and Sure

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CHAPTER 1

INTRODUCTION

1.1 PURPOSE AND BACKGROUND

The English and Welsh Criminal Justice System (EWCJS) has undergone many changes since 2010 in the drive by successive governments for efficiency in a time of austerity. “Change has swept the United Kingdom criminal justice systems over recent years” (Garside & Ford 2015, p.6). From 2010 a series of austerity policies has brought about stresses and strains, unparalleled in English Criminal Justice history. Since 2001, the EWCJS has, according to Lord Leveson, been subjected to legislation overload with many new offences being added to the statute book (2015). Yet, since 2010, there have been dramatic cuts to the budgets of the courts, the police, the CPS, and the defence community via reductions in the legal aid budget. Furthermore, the evidence given to the House of Commons Public Accounts Committee (PAC) is that although the crime rates are falling, (ONS 2015), there is no doubt that the profile of crime coming into the courts has changed significantly since 2010, with more sex crimes and frauds; cases that are more complex, demand more resources, and take longer to resolve. There have been two notable recommendations by lawyers to improve the efficiency of the EWCJS; namely the Auld report of 2001 and the Leveson report of 2015. During the Blair era there was a governmental attitude that the EWCJS was not fit for purpose, due in part to its reputed archaic practices and the vested interests of lawyers (Faulkner 2010). This thesis is aimed at determining the nature of the efficiency drive adopted since 2010 and how effective those efficiency measures have been in practice. It is important to realise that, although there is a core meaning to all economic efficiency concepts, there is more than one

efficiency concept. The US review is important in helping to put into context concepts of efficiency and some of the claimed causes of inefficiency in the courts. The examination of the US experience provides a foundation and a contrast in the exploration of the EWCJS court efficiency drive since 2010. Against the backdrop of austerity a range of possible efficiency measures, such as economies of scale, are not acceptable to the austerity programme because of the increased expenditure such measures involve. From the outset the efficiency drive has taken place when resources are being cut, and organisations and agencies within the EWCJS are urged to make more with less. However, the efficiency drive is not just determined by the need for austerity, it also derives further impetus from the theoretical underpinning provided by New Public Management (NPM). The aims of successive governments for the English criminal courts from 2010 have been to attain the dual, and related, goals of reducing costs and increasing efficiency. Billions are spent on the courts, legal aid, and probation, and they are of central importance to the rule of law and fundamental in the attainment of justice and the maintenance of security for all citizens. It is both academically important and socially essential that the success or otherwise of such efficiency reforms are examined and evaluated.

The research questions to be addressed are:

1. What are the concepts of efficiency adopted, explicitly and implicitly, by post 2010 governments in the efficiency drive in the English and Welsh courts and the EWCJS?
2. In the light of those concepts, what are the efficiency measures adopted by those governments?

3. What is the theoretical [and practical] contribution made to the efficiency drives by NPM?

4. How effective and successful are the efficiency measures so adopted?

The aim, therefore, is to examine the efficiency of the courts and the EWCJS. In the study, insights into the government's efficiency measures from 2010 to 2017 are gained from interviews with experienced criminal law court room advocates. A framework of efficiency concepts is provided which makes possible the classification of the ensuing findings. Those findings are collated, analysed, and then examined in the light of evidence from other sources to test consistency and validity. From those findings, the aim is to produce a holistic account of the efficiency measures within a perspicuous, coherent, and systematic theoretical structure.

Although the efficiency of the courts was the initial central concern, it soon became obvious that the topic could not be adequately addressed without an examination of the wider EWCJS. The efficiency of the courts is in part a function of the efficiency of the agencies that use the courts and help the courts to function.

1.2 OVERVIEW OF CHAPTERS

Ch2. Background

This chapter acts as a guide for the reader. It imparts some basic knowledge about the EWCJS and the scale of the financial cuts induced by the series of spending reviews. Fundamentally, it introduces some concepts of efficiencies which will be applied in the discussion and explains how Legal Aid and Probation fit into any efficiency scheme for the EWCJS. Court structure and court processes are also

sketched out so that the reader has some acquaintance with these guides before embarking upon the journey through the labyrinth of the EWCJS.

Ch3. The US: Efficiency and the Courts

It was essential to examine the concepts of efficiency and to examine their historical application to the courts, both by governments and academics. The review is important in helping to contextualise concepts of efficiency and some of the claimed causes of inefficiency in the courts. The general examination of the US experience provides a foundation and a contrast for the exploration of the more specific elements of the EWCJS court efficiency drive since 2010.

Ch4. Efficiency and the Courts: England and Wales

By examining governmental and departmental material, the review importantly sets out the basic governmental strategy for the reform programme of the courts and the EWCJS. Crucially, the basic underpinning provided by NPM to the efficiency measures is examined and the important Leveson report introduced.

Ch5. Methodology

The chapter covers the problems encountered in gaining access to potential interviewees and the ethical questions that arose in the endeavour. The chapter includes a profile of the research participants. The dynamics, problems, and advantages of insider and outsider research are discussed. The philosophical foundation of the research is explained and, importantly, the chapter explains why qualitative research is not only appropriate but also essential to this particular enterprise.

Ch6. Findings

The chapter covered the basic and initial findings of the research interviews. The chapter concentrates on what the participants considered to be the most important aspects of the topics raised.

Ch7. Are the criteria of efficiency satisfied?

The findings were put into a comprehensive structure that encompassed the main elements of the governments overall efficiency strategy. Further research from other sources including academics, lawyers, PAC, NAO, and reports from EWCJS agencies gave strong support to the observations of the participants. The question of whether the prime efficiency aims of reducing delay and 'getting it right first time' had been attained was discussed. As a result, the concepts of efficiency were revisited and a new concept of efficiency (functional efficiency) was used to show the limitations of governmental efficiency thinking.

Ch8. Efficiency and Three Important Bodies.

To provide a comprehensive overview of the diverse efficiency programme, the chapter examines the working of the programme on how it affects three very different EWCJS organisations.

Ch9. Allocative Efficiency and the *Raison d'être* of the Justice System.

This chapter includes discussions on how effectively the essential idea of allocative efficiency functions within the efficiency programme and the consequences of the efficiency programmes for the Rule of Law.

Ch10. Conclusion

1.3 PRACTITIONER RESEARCHER

As a practitioner researcher, I have extensive experience of the courts. Since 2007 I have had Higher Rights of Audience to appear in all English criminal courts. I have conducted numerous trials and ancillary measures and therefore have a professional knowledge of procedures, processes, and organisation of the courts together with rules of evidence, types of cases, and an awareness of the needs of victims and witnesses.

Most of my service as a lawyer was in the role of prosecutor, but I also have experience as a self-employed advocate and time spent as a member of solicitors' chambers. I have seen many changes in the EWCJS since 1994; changes to statutes, the introduction of new crimes and the amendment of old, the introduction of new procedures, and the subtle change of pressures upon the members of the legal profession. These changes have been in addition to some extensive EWCJS initiatives and internal CPS programmes. I am, therefore, aware of the concerns of lawyers, both for the defence and the prosecution, both employed lawyers and the independent.

In addition to my court work I have extensive experience of advising the police in respect of charging suspects and the conduct of prosecutions. I have a thorough knowledge of police procedures, processes, and resources. The great advantage of being a lawyer, in this research endeavour, was the fact that I spoke the same language as the participants. There was less chance of misunderstanding, and it was relatively easy to gain a rapport with the interviewees.

However, I am now an outsider because, due to ill health, I have retired from my profession. I have considered the questions posed by insider research in Chapter 5 (Methodology). At this stage, I simply wish to emphasise that I was aware of the need for

reflection throughout the research process, and also the danger of subjective alignment and misplaced empathy with members of the legal profession.

CHAPTER 2

BACKGROUND

2.1 BACKGROUND

There have been significant economic and political changes in the UK over the past twenty years, which have helped to mould the everyday activities of the UK population, including the business of the courts. The emergence of 'Blairite' politics and economics, and its subsequent legacy, has been fundamental in shaping this period of UK history. Domestically, Blairite politics has been identified with public service investment, a focus on education and stronger law enforcement (Bush 2016). The world economic and financial crisis of 2007 /2008 brought to a halt many of the ambitious plans of the New Labour government and ushered in a period of economic austerity under a coalition government from 2010.

To fully appreciate the scope of the research questions it is important that the post 2010 austerity programme and its extent is understood. The austerity programme has resulted in marked administrative changes to the courts and the agencies which jointly contribute to the court business.

There is an amalgam of bodies which help to determine the efficiency or otherwise of the courts. The Ministry of Justice (MOJ) is responsible for the courts, the prisons, the probation services, and the attendance centres. According to the Ministry's own website, they are one of the largest government departments, at the time of writing, employing around 70,000 people (including those in the probation service), with a budget of approximately £9 billion. In 2016 they provided services across England and Wales,

including those at 500 courts and tribunals, and 133 prisons. They also work in partnership with other government departments and agencies to reform the criminal justice system, to serve the public, and support the victims of crime (MOJ 2016).

Her Majesty's Courts and Tribunals Service (HMCTS) is responsible for the administration of criminal, civil and family courts and tribunals in England and Wales. This body was created in April 2011 when it brought together Her Majesty's Courts Service and the Tribunals Service into one integrated agency as part of the MOJ.

HMCTS has committed itself to follow the MOJ's strategic vision for reform, namely, to create a more effective, less costly and more responsive justice system for the public (HMCTS 2011). More specifically the aims have been to transform the EWCJS and the courts, making them more flexible and efficient, and to create a sustainable Legal Aid system, which is more affordable and more effective (MOJ 2014c).

The HMCTS remains operationally independent, and the responsibility for overseeing the leadership and direction of the agency rests with its board, three of whose members are judicial officeholders and one of whom is Senior Presiding Judge. The Lord Chancellor is required by section 1 of the Courts Act 2003 and section 39 of the Tribunals, Courts, and Enforcement Act 2007 to ensure there is an efficient and effective system to support the business of courts and tribunals (Treasury 2011; Coalition 2010; HMCTS 2016).

2.2 FINANCIAL CUTS AND SPENDING REVIEWS

The establishment of the United Kingdom coalition government, against the background of the global financial crisis, marked a decisive shift to an austerity economic programme. The *Programme for Government*, published on 20 May 2010, which formed the basis of agreement between the Conservative and Liberal Democrat governing partners,

described deficit reduction – closing the gap between higher government spending and lower government income – as the most urgent issue facing Britain. The coalition's chosen approach – often referred to as 'austerity' – involved reducing government spending, and doing so rapidly (Coalition 2010).

The Government strategy of dealing with the governmental debt problem was clarified at page 5 in the Plan for Growth of 2011. The June Budget 2010 and the 2010 Spending Review set out plans to tackle the fiscal deficit and restore debt, as a percentage of GDP, to a downward path. The macroeconomic stability that was the hoped for consequence of these measures was considered an essential pre-condition for sustainable growth (Treasury 2011).

During his budget statement on 22 June 2010 the Chancellor, George Osborne, told the House of Commons that, by the time of the 2015 General Election, the coalition planned to have eliminated the 'structural deficit', which is a budget deficit that results from a fundamental imbalance in government receipts and expenditures, as opposed to one based on one-off or short-term factors. This meant swift and sharp cuts to public spending; set out in greater detail in the October 2010 *Spending Review*. In England and Wales, the Home Office and MOJ then faced cuts of 16 and 29 per cent respectively and the cuts have continued since with consequent reductions in court infrastructure (Treasury 2013). Part of the programme of rationalisation has involved the selling off and closure of court rooms. After consultation, the Ministry closed 86 courts. For the criminal law, this means nearly one fifth of the courts estate being closed and a reduction in capacity: approximately 23% of magistrates court rooms and 4% of Crown Court rooms (Hyde 2015).

By the coalition's fifth year, the court system across England and Wales was certainly much reduced. Some 146 courts had been closed since 2010. This included close to one third – nearly 100 – Magistrates' courts. Adjusted for inflation, annual expenditure by HM Courts and Tribunals Service had fallen by nearly half, from more than £1.5 billion in 2010-11 to £863 million in 2014-15. (Garside & Ford 2016, p.10)

The Spending Review of 2010 has been followed by those of 2013 and 2015. Over the four-years from 2010, the MOJ intended to reduce its net annual expenditure by around 27% in real terms. This was intended to attain £2.7bn savings annually by 2014-15 (MOJ 2014).

This was followed by further cuts to budgets in 2015. The Spending Review 2015 claimed that its reform priorities would deliver significant efficiencies within its back office running costs, and the MOJ will be able to reduce its administrative budget by 50% by 2019-20. These cuts were ameliorated by the promise to invest more than £700 million to fully digitise the courts and create a more modern estate. Such investment would satisfy the aim of greater future savings and would, it is claimed, generate savings to the taxpayer of approximately £200 million a year from 2019-20 (Gov.uk 2015).

In addition to the financial cuts to the budgets of the MOJ and HMCTS, during the same period there have been cuts to those organisations upon which the flow of business in the criminal courts depend, namely the police and the Crown Prosecution Service (CPS). In the five years from March 2010, police officer numbers declined by nearly 12% - a loss of almost 17,000. The decline in the workforce was even greater, with a loss of 15,877 support staff and 4,587 police community support officers (PCSOs) (Newburn 2015).

During the five years of the coalition government, the central government contribution to police expenditure was cut by one quarter in real terms. Although this was slightly offset by local increases in council tax, it still resulted in an overall 18% reduction in police budgets in real terms. The CPS, who conducts the majority of prosecutions in England and Wales, has proportionately suffered even greater cuts than the police. The CPS General Inspector has stated that over the previous five years from 2010 to 2015, the CPS had reduced its staff size by 30%, losing 2,467 members of staff (Bowcott 2015).

Because the budgets of the Home Office and the MOJ are not ring fenced, the cuts placed upon them are disproportionately large. Between 2010–11 and 2015–16, the government planned to have cut spending by Whitehall departments on administration and the delivery of public services by 9.5%. Since some areas of spending have escaped real-terms cuts – specifically spending on health and official development assistance and non-investment spending on schools – the cuts to the departments and agencies which do not have ring fenced budgets are much greater than the average of 9.5%. The Institute of Fiscal Studies estimates that the Home Office and MOJ could face even larger real terms cuts: up to 46 and 45 per cent respectively by 2020 (Emmerson, Johnson, & Joyce, 2015).

The scale of the government's austerity cuts and their timing has triggered criticism, both from academics and politicians (Krugman 2015). It has been argued that the austerity strategy was not required in the first place (Murphy 2017). That austerity policies generate substantial welfare costs and also hurt demand—and thus worsen employment (Ostry, Loungani, & Furceri, 2016). Furthermore, there are observations that the programme of austerity turned a nascent recovery into stagnation (Wolf 2013). However, despite these criticisms, most economic pundits have endorsed the need for some kind of

austerity programme. Most disputes have centred upon the methods and implementation of the austerity programme.

It may be argued that criticism of efficiency measures carried out during a period of austerity is misplaced. The austerity is forced upon the government due to the parlous state of the economy. Furthermore, once the reduction in overall government spending is set then the MOJ, for example, is straight jacketed into a series of cuts.

Even if one were to accept the need for such deep cuts, such acceptance does not preclude criticism of the nature of programmes adopted and the consequences of the efficiency measures. Indeed, it seems almost a moral imperative to justly criticise programmes that do not fulfil their promises in a time of austerity in order to make best use of the resources available. Importantly, there has to be sensitivity to perverse and unexpected results which are so adverse as to outweigh policy gains of marginal financial advantage. If there is an inadequate plan and / or poor implementation of the envisaged programme then it's appropriate for informed commentary to take place.

Despite the change in administration with the appointment of Theresa May as Prime Minister in 2016, and discounting a change of government in the near future; it is likely that an austerity path of some kind is likely to be followed until Brexit is resolved.

2.3 CUTS AND / OR EFFICIENCIES

Because of the high proportionate cost of staff in their total budgets, the cuts in the administration budgets of the MOJ and HMCTS have meant a marked reduction in staff numbers. In addition to staff cutback, a large number of courts have closed, some have been sold off, and others remain mothballed until a buyer is found. The Police, who obtain most of the evidence in criminal matters, have fewer officers, and the CPS, that

organisation which utilises that evidence to obtain convictions, has had its numbers drastically reduced. Despite these cuts, there is an underlying assumption, and assurance, by the MOJ that there need not be a problem, because apparent potential shortfalls in performance can be met by increased efficiency.

Since 2010, we have worked hard to reduce the costs of our services to the taxpayer. This will mean that net spend in the department will fall by 34% in real terms between 2010/11 and 2015/16. In many areas we have improved our performance, in others our focus has been to maintain performance at reduced cost. [Furthermore, in respect of the courts the aim is transformation, namely to] Transform the Criminal Justice System and the courts, making them more flexible and efficient. (MOJ 2014a, p.3)

Thus, the cuts cannot only be managed by increased efficiency; the cuts are a stimulus to the transforming of the system. However, it must be tempting for government organisations, faced with having to implement what are actual cuts to services, to simply call such cuts 'efficiencies'. Furthermore, the way efficiencies are implemented must be taken into account. Efficiencies cannot sensibly be delivered in isolation. An end-to-end approach to services is required. One must ask if the right service is being delivered in the right way, because if not, a gain in efficiency on its own may not deliver the best use of public money (Schultz 2015).

2.4 EFFICIENCY CONCEPTS

In the improvement plans, audits, and other material emanating from the Home Office, the MOJ and the HMCTS, there are many references to the need to increase efficiency

and to do more with less. The government White Paper Swift and Sure, (WPSS), and five MOJ Reports, provide over 150 references to efficiency, yet no definitions are supplied to expand upon this important and central concept. The authors of the governmental, ministerial, and departmental material may deem that the concept of efficiency is self-evident common-sense; simply some variant on the intuitive more for less and does not have to be explained. More than one meaning of 'efficiency' can be discerned from governmental and ministerial material and at this juncture it is appropriate to put forward some meanings of 'efficiency'.

2.4.1 Technical efficiency relates to how much output can be obtained from a given input, such as a worker or a machine, or a specific combination of inputs, whilst maintaining quality. Maximum technical efficiency occurs when output is greatest from a given quantity of inputs. A firm is technically efficient if it operates employing the minimal level of resources given the outputs, or produces the maximal level of outputs given the inputs (Osman, Anouze, & Emrouznejad, 2013).

2.4.2 Productive efficiency occurs when a firm is combining resources in such a way as to produce a given output at the lowest possible average total cost (Fried, Knox Lovell, & Schmidt, 1993). Technical and productive efficiencies are similar, but not identical concepts. Where a court has some autonomy of manipulating its inputs, such as employees, court buildings etc, then it is logical for it to aim for productive efficiency, for it is at that point that cost per unit are at the minimum. Productive and technical efficiency are related in that an increase in technical efficiency will usually reduce cost per unit and therefore improve productive efficiency. The converse is not necessarily true. A reduction in the price of factors of production will reduce costs and hence increase

productive efficiency, but this will not increase technical efficiency. An example will clarify:

1. Increase in technical efficiency.

Assume at time T1, 50 units of Factors of Production (FP) are employed at a total cost of £100.

100 units per week are produced. Average cost (AC) is therefore £1. $100/£100$

Technical Efficiency (TE) = $100/50 = 2$

At time T2, there is a technical innovation without additional cost, which means that 200 are produced within the same time frame with the same amount of FP. TE has improved.

TE = $200/50 = 4$. So had productive efficiency (PE), for AC is reduced. 200 units are now produced for a cost of £100. AC falls from £1 to 50p.

2. Increase in Productive efficiency.

Assume at time T1, 50 units of Factors of Production (FP) are employed at a total cost of £100.

100 units per week is produced. Average cost (AC) is therefore £1. $100/£100$

At time T2, there is a fall in the cost of FPs. FPs halve in price from £100 to £50, and 100 units are still produced from the same amount of 50 FPs.

AC falls from £1 to 50p ($100/£50$). This is an increase in PE.

Although AC falls to 50p, without further intervening factors, technical efficiency stays the same at $100/50 = 2$.

Productive Efficiency occurs when average cost is lowered and quality of output is not compromised. It is assumed that the quality of the output is unchanged, in other words the lower cost per unit has not been gained by skimping on quality. Budget cuts, which reduce the cost per case, are therefore instances of productive efficiency even though there may not have been any changes in technical efficiency, i.e. better methods of working. Care must be taken in implementing budget cuts because, if badly conducted, they may ultimately lead to a rise in average costs. Thus, for example, a firm may reduce its maintenance budget, and average costs will fall in the short run, but as machines break down and production is lost then, in the long run, average costs begin to rise.

We can view the above relationship between the concepts by looking at the two broad measures adopted by the MOJ; that of reducing delay, and that of reducing costs.

(i) Reducing delay. If there is no prospect of increased resources, then reducing delay will depend upon technical efficiency. Technical efficiency means fewer hearings, more cases dealt with per unit of time, and therefore fewer costly man hours spent on each matter. Reducing delay will thus reduce costs. Technical efficiency therefore leads to productive efficiency.

(ii). Reducing costs will not necessarily reduce delay. Reducing costs may in some instances increase delay. As an example, cutting costs by reducing the number of court ushers may mean that court business is slowed down, leading to delays.

Where there is a high degree of inflexibility regarding factors of production, for example where all employees are on long term contracts, court buildings cannot be relinquished or sold, then, *ceteris paribus*, technical efficiency is the main option for the court organisation striving for efficiency. A simple measure would be: to process the most

number of cases through the courts in the shortest amount of time, given the number of fixed inputs.

It must not be assumed however that technical and productive efficiency are the only efficiency measures applicable to the legal system.

2.4.3 Dynamic efficiency is commonly associated with the Austrian economist Joseph Schumpeter and means *technological progressiveness* and *innovation* (Schumpeter 2010). This concept of efficiency relates to how technology improves efficiency over time.

Courts are presently more and more enjoined to adopt technological and innovative processes, as exemplified by the UK's MOJ's programme for the digital courtroom where investment in technology will improve the efficiency of criminal proceedings. The aim is to reduce duplication between CJS agencies and unnecessary attendance at court and remove on the need for inefficient paper processes (Justice 2015).

The adoption of technology by an organisation or firm should, over time, move a supply curve down and to the right, meaning lower costs and greater output. However, the adoption of new technology can be costly. Whether such an investment is ultimately worthwhile will depend upon a cost benefit analysis. Nevertheless, there is general consensus that better technology in the productive process means higher production, greater technical efficiency, and lower cost per unit of output.

2.4.4 Allocative efficiency. Production of goods and services does not take place in a vacuum. There are ultimate consumers of those products and services. Allocative efficiency occurs when there is an optimal distribution of goods and services, taking into account consumer preferences. When the idea is applied to the courts, it could be said that if the users of the legal services are not consulted, then governments in their wisdom

could provide either too much or too little of the desired legal services. In economic parlance:

Allocative efficiency occurs when consumers pay a market price that reflects the private marginal costs of production. The condition for allocative efficiency for a firm is to produce an output where marginal cost, MC, just equals price, P. (Higson 2011, p.38)

Allocative efficiency takes account of consumer preferences. As such, it takes a step towards incorporating a wider idea of goals and effectiveness rather than the more narrow concepts of productive or technical efficiency. The use of resources can be efficient in producing goods and services, but if these services are not wanted by the consumer then such provision is a fundamental waste of resources (Gwartney, Stroup, & Clark, 1985).

2.4.5 Pareto efficiency is a balance of resource distribution such that one individual's lot cannot be improved without impairing the lot of one or more other individuals.

The concept derives from Pareto's work on income distribution and economic efficiency. In recent years, the principle has been applied to other areas of study including engineering, project management and the social sciences.

Within a given system, if one individual or other entity can be given a benefit without worsening the situation for any other individual or entity, doing so is known as a Pareto improvement. According to this concept, it is desirable to continue to make Pareto improvements until it is no longer possible because a benefit to one individual would

worsen the lot of one or more others. When no further Pareto improvements can be made, Pareto efficiency is said to have been reached (Pettinger 2012).

Pareto efficiency occurs at the Production Possibility Frontier (PPF), the curve which shows the combination of goods that can be produced when all the factors of production are used. The curve shows the trade-off between, for example, goods and services: more goods can be produced only by sacrificing the production of services. Pareto efficiency occurs at each point on the Production Possibility Frontier. However, it is only possible to move from A to B and produce more services by sacrificing the production of goods. The combination of goods produced at Point C is Pareto inefficient because not all the factors of production are being utilised (Pareto 1896; Pareto 2009).

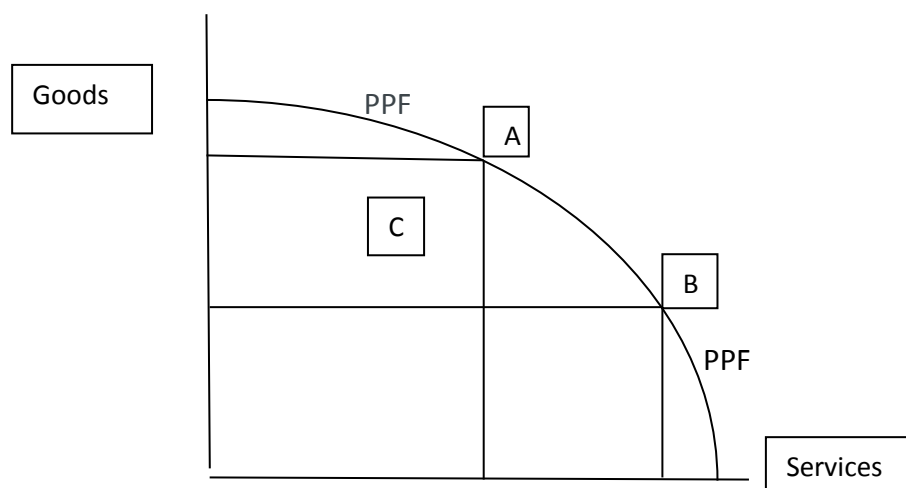


Fig 1. Pareto Analysis

Pareto efficiency has been criticised because it is a static analysis. Some economists have criticised the idea of full employment which is a necessary condition of attaining Pareto efficiency. In the long run, full employment leads to macroeconomic inefficiency. There has to be some spare capacity to enable the economy to grow at a fast rate; and by

endorsing measures to attain full employment, the result is a stultifying effect on economic growth (Harrod 1963).

From the aspects of social policy, a major criticism of Pareto efficiency is that it does not guarantee desirable or fair outcomes. Thus a society could be efficient in the Pareto sense but have a great deal of inequality.

The Pareto analysis is therefore often supplemented by a clear idea of social benefits and costs. The Kaldor-Hicks criterion is a development of the basic Pareto position. Kaldor-Hicks is based upon the idea of compensating those who have been made worse off by a Pareto adjustment. Thus, for example, a Pareto movement along the PPF away from health services to education may be justified if those losing the health services receive lower tax bills. This concept is often applied in welfare economics and is a basis for cost benefit analysis. With this principle applied in cost benefit analysis, the total costs of a project are compared to the total benefits. If the benefits outweigh the costs, the project may go ahead. For example, a project to build a school may have benefits that outweigh costs, such as the loss of homes that have to be pulled down on the potential school site. These costs can be made more acceptable by compensating those who have lost their homes (Kaldor 1939; Hicks 1939).

When the Pareto analysis is combined with Indifference curves it helps to elucidate the concept of allocative efficiency (Appendix A).

2.5. SIMPLE EXAMPLES OF THE APPLICATION OF PRODUCTIVE AND TECHNICAL EFFICIENCIES IN THE CRIMINAL JUSTICE SYSTEM

2.5.1 Legal aid

Criminal legal aid can offer: advice and assistance from a solicitor on criminal matters; free legal advice from a solicitor at the police station during questioning; the cost of a solicitor preparing a case and initial representation for certain proceedings at a magistrates' or Crown Court; full legal representation for defence in criminal cases at all court levels; and a duty solicitor to provide free legal advice and representation at magistrates' court (Legal Aid Agency 2017).

If the applicant passes the 'interests of justice' test, he or she must also pass the means test to qualify for legal aid. The aid will be granted to an applicant who does not have the financial means to fund their own representation in a magistrates' court. Defendants who fail these tests will be either unrepresented or will have to pay at least a proportion of the cost of their legal representation (Slapper 2014).

The government funds the major defence costs through the legal aid fund. All this provision comes at a cost, and the total legal aid bill in 2010 was two and a half billion pounds.

Although a budget cut in legal aid *per se* does not immediately strike the observer as doing things more 'efficiently', it does mean a lower cost per case to the government, and, as noted above, lower average cost simply means greater productive efficiency. Accordingly, government action has brought down the amount spent on legal aid from £2.4 billion in 2010 to £1.6 billion in 2015 (Gove 2015).

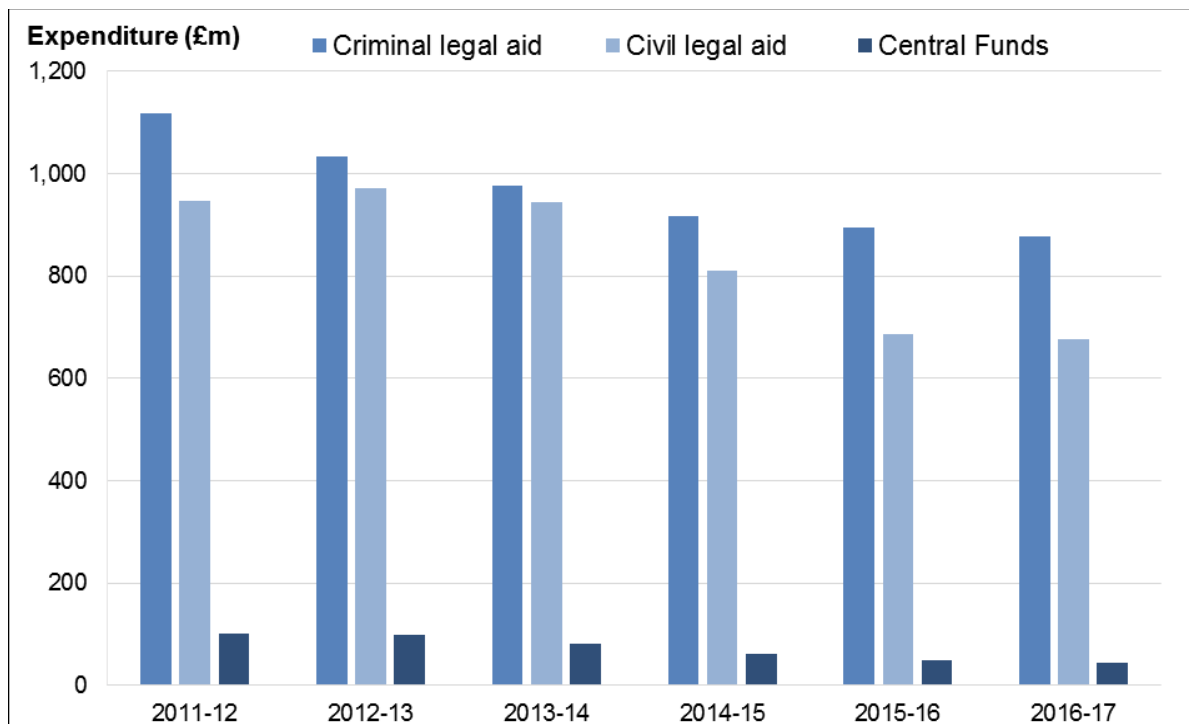


Fig 2. Legal Aid Expenditure. Legal Aid Statistics in England and Wales January to March 2017 (MOJ 2017b)

The diagram is taken from the MOJ's Legal Aid Statistics and shows the trends in both civil and criminal legal aid. Changes to eligibility, fees reductions to legal aid solicitors, and the anticipated fall in the volume of court work have reduced the sums paid out in legal aid. Criminal legal aid restrictions have also included no legal aid for prison law cases; introducing a financial eligibility threshold of £37,500 (disposable household income) in the Crown Court, and refusing to fund cases with borderline prospects of success. A new contract and fees regime for legal aid work has also been applied.

However, there may be perverse consequences over time due to the cuts in legal aid. As stated, a cut in legal aid will immediately reduce the cost per case, but, with fewer defendants receiving legal aid, the court process may be slowed, the court may take longer to explain the procedure to unrepresented and unqualified defendants, and the

bench may allow more time for defendants to present their case. The result may be that technical efficiency is diminished, namely the number of cases going through the court in a certain period of time is reduced. This in turn, could mean the expenditure of more resources and courts being kept open for longer in order to cover the slower pace of work.

2.5.2 Probation

The probation service, both directly and indirectly, has an effect upon both court efficiency and effectiveness. A good probation service will increase the effectiveness of sentencing through timely, considered, and informed reports which facilitate the courts getting a 'grip' on defendants. On a more mundane level, if probation is not available in the courts to do reports then the court process slows. Furthermore, if the reports are poorly drafted and ill considered, then the result may be inappropriate punishment which could prove to be ineffective. The government's dual aim with probation has been to increase both technical and productive efficiency, the idea being that competition will lower costs, and increased effectiveness will be ensured by a payment by results system based upon the numbers of offenders who do not reoffend.

The state sector New Probation Service works with the more 'difficult' cases whilst the privatised Community Rehabilitation Companies (CRCs) will tend to the lower and medium risk offenders. In addition to the reduction of costs, part of the justification of the changes was to reduce the recidivism rates of offenders (NAO 2014a). The ideas of competitive tender and the reduction of reoffending would reduce the costs to society and the CJS. Both economic efficiency and policy effectiveness are enshrined in these reforms as aims.

2.5.3 Efficiency in the Court Process

Virtually all criminal court cases start in a magistrates' court, and more than 90 per cent will be completed there. The more serious offences are passed onto the Crown Court, either for sentencing after the defendant has been found guilty in a magistrates' court, or for determination including a full trial with a judge and jury.

A large number of cases are heard in the magistrates' court every year, and Open Justice (2016a) puts this at about 1.5 million to 2 million criminal cases. According to the website, in the magistrates' court, there are 14 weeks between offence and charge, 5 weeks between case being laid and first hearing, and only three weeks between first hearing and case outcome.

As may be expected, a much lower number, about 100,000 cases per year, are passed to the Crown Court to be tried. A further 40,000 cases are also passed to the Crown Court because the punishment the magistrates' court thinks the defendant deserves is more than it can give. In the Crown Court, there are approximately 20 weeks between offence and charge or matter laid before the court, 3 weeks between case laid and first hearing, and twenty nine weeks between first hearing and case outcome (Open Justice 2016a).

As stated above if there could be greater technical efficiency, in other words more cases dealt with in a given time period, this could also lead to greater productive efficiency. Thus the tempo of court business becomes important to an efficiency programme. For example, prior to 2013, any matters going to the Crown Court were subject to Committal proceedings, which called for the preparation of a comprehensive committal bundle by the prosecution which took up to three weeks to prepare. Committal hearings were hearings in the magistrates' court to decide whether the matter should be sent to the

Crown Court. Most such hearings were accepted by the defence who would admit that there was a case to answer. Nevertheless, a full 'committal bundle' would have to be provided for the court and the defence in any event, the matter taking between two to three weeks. In addition, there was contested committal hearings which were small trials 'on the papers' and such hearings could last up to a day with all the paper contents being read out in court. As part of wider measures to speed up justice and improve efficiencies in the justice system, committal hearings were abolished nationally at the end of May 2013. Their abolition has sped matters up and, as a result of the change, triable-either-way cases can now be sent straight to the Crown Court, if the matter is serious enough, rather than having to await a committal hearing. As a result of this change, during 2013, Crown Court receipts for triable-either-way cases increased by 32% between Q1 and Q4. This increase is being driven in part by the abolition of committal hearings. The result was that speeding matters up in the magistrates court led to increased delays in the Crown Court (MOJ 2014d).

On a sending to the Crown Court, a defendant will be asked how they will plea, although the case will be heard in the Crown Court. The rationale for the procedure is that the majority of cases within the Criminal Justice system end up as guilty pleas and therefore it is sensible to identify and remove those cases soonest. This will assist the court in listing only effective cases, and help reduce the unnecessary burden imposed on the police, the prosecution and the defence when cases are prepared for trial that result in a guilty plea. This Early Guilty Plea (EGP) scheme has an advantage for the defendant who can receive a reduction of one third in his eventual sentence. It also saves money in preventing unnecessary listing and preparation for trials. The simple strategy adopted by the MOJ is to reduce the number of hearings in both the magistrates' court and the

Crown Court. Fewer hearings mean, other factors remaining constant, a speedier system which is, therefore, technically more efficient. Fewer hearings also imply greater productive efficiency, in that cost per case should also be reduced.

The *Better Case Management* programme was introduced throughout England and Wales on 5 January 2016 and includes a uniform national EGP scheme. The initiative's aim is to increase, through early engagement between all participants in proceedings, the number of cases brought to a conclusion by way of a single, effective, hearing – the Plea and Trial Preparation Hearing (PTPH). There should also be a reduction in the number of hearings needed where cases proceed to trial, as a result of early identification and discussion of key issues. The idea is that the new processes will reduce the number of hearings and curtail delays in the system, speed up justice and be more cost effective.

The introduction of the PTPH is considered to be a step towards electronic case management and the electronic monitoring of compliance which will be possible with the introduction of the *Common Platform*. It is claimed this will have huge advantages for all. The use of a single, national process with largely standard directions is essential to the future development of systems for the court, prosecution and defence that work one with another. The new PTPH and related procedures will provide a single national process to be used in all Crown Courts. It builds on the *Transforming Summary Justice* initiative in the Magistrates' Courts (LAA 2015; Open Justice 2016a; HMCTS. 2016). A simple protocol structure will, it is hoped, reduce complication and unnecessary delays with consequent savings for the public purse.

2.6 LEVESON REPORT

The terms of reference of the Leveson Report were finalised on the 4th April 2014 and the report was published in January 2015.

Sir Brian Leveson, President of the Queen's Bench Division, provided a detailed study of criminal procedures by someone who knows the CJS. The report concentrates upon refining the court system to eliminate delay and inefficiency. He addresses the internal workings of the courts and the organisation and efficiencies of those who use the courts. 'Getting it right first time' has become a mantra, and the onus is upon the police and prosecution making appropriate charging decisions, based on fair appraisal of sufficient evidence, with proportionate disclosure. Thereafter, case ownership is a *sine qua non* for both prosecutor and defence if matters are not to be delayed. The rest of the paper is a series of observations encompassing technology, listing procedures, case allocation between the magistrates' and Crown Courts, pre-trial Crown Courts procedures, and Crown Court trials. (Leveson 2015).

The ex-Minister for Justice, Michael Gove, on taking up his new post, committed himself to the speedy implementation of proposals from Leveson to streamline and modernise the EWCJS (Morris 2015b). There is no reason to believe that this aim has been abandoned by the May government.

2.7 CHANGES IN GOVERNMENT AND PERSONNEL.

Since 2010 there have been three governments and six Lord Chancellors.

The coalition ushered in a period of austerity that was continued by the Cameron government. There were differences in approaches between the Lord Chancellors

Grayling and Gove, especially in respect to legal aid. However, the approaches were still within a severe austerity framework. Gove was more flexible than Grayling, in that with legal aid he abandoned the next tranche of legal aid cuts and the dual legal aid system that was to be inaugurated. However, it may be said that this ‘flexibility’ was forced upon him due to the vigorous legal action taken by more than ninety legal firms. It was a situation he could not win in the courts and he wisely backed down. From the point of view of austerity politics there is in reality nothing to choose between Grayling and Gove. From the tenor of Elizabeth Truss’ swearing in speech as Lord Chancellor, she was committed to the same kind of reforms pursued by her predecessors (Truss, 2016). This observation has received support by the publication of *Transforming Our Justice System* (MOJ 2016). There are no new substantive ideas in this short document. Like its predecessors, it talks of streamlining, digitalisation, and transparency. Truss appeared to be just as committed as Gove to ‘rationalise the system’ as recommended by Leveson (MOJ 2016, p.10). David Lidington, did reveal that he would continue in the main traditions laid down by his immediate predecessors, emphasising that he wanted to “make sure the administration of justice is swifter and puts the citizen at the centre of what we do by harnessing all the new opportunities which the technologies of our digital age have to offer,” ending with the observation that “much hard work has already been done to modernise the courts and tribunals system for the 21st century” (Lidington 2017). However, he has been supplanted by David Gauke, the sixth Lord Chancellor in eight years. The new Lord Chancellor is seemingly following in the footsteps of the recent holders of that office, promising efficient and effective courts with the continued modernisation of the courts (Gauke 2018).

The changes at the Treasury, in both policy and personnel, as ushered in by the May government will most likely not mean a departure from austerity policies. The 'abandonment' of Osborne's fiscal targets by the May government is perhaps more cosmetic than real.

Austerity, Hammond made clear, has been modified, rather than abandoned.

The departmental spending cuts announced last autumn remain in place and planned welfare reductions were softened, not scrapped. There was no new money for the NHS despite an ever-greater funding crisis. Osborne is gone, but Osbornomics endures. (Eaton 2016)

The government is still committed to an austerity programme. The abandonment of fiscal targets is prudent to the extent that Osborne never hit his targets and the successive failures to hit the targets were embarrassing.

The abandonment of fiscal targets gives theoretical flexibility to the government's economic programme, but events since Brexit have constrained government policy. The £21.2bn deterioration in the forecast public finances for 2017-18 since the March 2016 Budget (Giles 2016), means an even greater austerity regime than that of Osborne's, especially as the Prime Minister has promised that she will eventually balance the budget.

However, the general election result of June 2017 has caused some newspaper pundits to conclude that austerity is at an end. "The collapse of the citadel of austerity is truly remarkable in its rapidity" (Chu 2017). The *Independent's* view is backed up by the main story in the *Times* of the same date, where it is reported that, "Teresa May is poised to bring to a close seven years of austerity after Tory MPs warned that they would refuse to vote for further cuts" (Elliot, Coates, & Wright, 2017). However, such observations were

countered by more cautionary stances pleading with May not to abandon austerity (Riley-Smith, McCann, & Rayner 2017), whilst others were totally sceptical at any suggestion that austerity was about to be abandoned (Bloomer 2017).

In this period of economic and social uncertainty, any government, despite its rhetoric, is faced with a series of economic quandaries. In this time of Brexit and uncertainty, there is a natural tendency not to abandon prudence. The economic and interest burden costs of funding the deficit are enormous, and at the time of writing there is a very real danger of interest rate rises to combat increasing inflation. Any interest rate rises will increase dramatically the burden of funding the deficit. 'No more austerity', in practical terms, may just mean an end to cuts, not an end to austerity. As Bloomer (2017) argues, "in reality an end to austerity is likely to simply mean no further cuts". Any increase in spending, by whatever government, is likely to mean increased spending on the headline departments and ministries such as Health and Education. There are few votes to be gained by increasing legal aid. The MOJ, in any event, has its own plan, based on the efficiency savings that will be returned by the investment in its envisaged digital revolution and software.

In any event, the economic consequences of Brexit may mean not only uncertainty in the short term, but also in the long term the emaciation of the financial services sector; some companies may redeploy to pastures which are less economically hostile. A lower pound may boost economic profits in the short term, but in the long term is inflationary. The resulting increase in production costs will diminish UK competitiveness and nullify the benefit of the currency depreciation. Any economic strategy may fail, simply because the dice are so heavily weighted against prosperity in a world where a country has set itself

adrift from a large trading bloc and has not been able to negotiate advantageous trading deals with countries outside that bloc. The result may be that, despite intentions to the contrary, financial 'austerity' is forced upon the UK by external economic shocks.

The 2017 removal of the 1% pay cap for police officers and prison officers and the 2018 pay rises for NHS staff have been considered by some as the opening of flood gates and that austerity is crumbling at the edges. Nevertheless, the changing attitude to pay restraint by some members of the government is more to do with politics rather than economics. The situation was neatly summed up in a *Guardian* editorial which observed that "the economics of capping public sector pay – to meet the government's flexible deficit reduction target – have not changed. But now they exist in an altered political world" (Viner 2017).

At the time of writing, we have very changed circumstances from 2016. Accordingly, in respect of the EWCJS, it is cautious to believe in the possibility that there will be further real terms cuts in the EWCJS budget in the next four to five years. However, with the changes in domestic politics, it is perhaps realistic to anticipate that any adherence to an 'austerity' regime will simply mean that there is no overall increase in the EWCJS budget over the planned input of capital spending already announced.

CHAPTER 3

THE US: EFFICIENCY AND THE COURTS

3.1 INTRODUCTION

This chapter explores the available literature on the efficiency of the US courts. The second section is partly historical and is centred upon the US court efficiency experience. Most of the academic work on court efficiency originated in the US and this section also provides a necessary contextual background to contrast to the English experience. The third introduces a distinction between 'effectiveness' and 'efficiency'. The fourth section portrays some of the practical effects US academic work has had upon US court business, processes, sentencing, and penology in general. Fifthly, this chapter includes a critique of US works on efficiency. It must be emphasised that academic work in the US, which is centred on the idea of 'efficiency', has helped to fashion penology policy, court processes, and a reduction in court Alternative Dispute Resolution (ADR) and rehabilitation practices.

3.2 US GENESIS

It was Roscoe Pound, the great American jurist, who made the first notes in the clarion call against court inefficiency. His crusade against the conceived archaic practices of the American courts was built partly upon his adherence to the thoughts of *Scientific Management* espoused by the engineer Fredrick Winslow Taylor (1856-1915). Taylor's ideas were developed over many years by his observation of US industrial practices at the Midvale Steel works, culminating in his influential work, *The Principles of Scientific Management*, published in 1911. Fundamentally, Taylor believed in rigorous measurement of work processes, total objectivity in the assessment of which methods

work best, and the consequent mechanization of work and elimination of the human element (Taylor 1972). His writings and teachings influenced the eclectic Roscoe Pound who wanted to apply the methods of science and efficiency to the American courts.

Legal rules and juristic doctrines may be compared to the formulas of the engineer. They express the experience of the past in administering justice and make that experience available for the judge and the legislator in convenient form just as the formulas of the engineer embody the experience of the past and relieve him from the necessity of making long calculations and engaging in elaborate preliminary mathematical investigations. The conservation of social assets, the elimination of social waste, are juristic problems which may easily be stated in terms of engineering. (Pound 1917)

In the extract above we have an interesting juxtaposition of scientific jurisprudence and utilitarianism. In Benthamite terms, the application of principles of precision engineering to the legal system will be repaid by the resulting benefits to society. However, success in jurisprudence presupposes ability to measure. In his address to the American Bar Association in 1906, Pound suggested that court performance could be measured if courts “were simplified, unified, and used business like methods” (Pound 1906, p.10).

From a historical point, it may seem that Pound's target was wide and obvious; courts as a target were an easy one in many ways. In the United States, state courts varied dramatically in organisation, bureaucracy, decision making processes, and efficiency. Their varied structure and processes would make differences in efficiencies stand out to the impartial observer.

Despite initial resistance from the legal profession, Pound set the tone of debate in US jurisprudence for the following years. “Progressive Movement judicial reform principles...unification, clear lines of authority, and administrative control-were embodied in the court organization pronouncements and standards that have represented the conventional wisdom of court administration for much of the century” (Dosal, McQueen, & Wheeler, 2007, p.1294).

In the wake of the calls for change sparked by the urgings of Pound, the US reform movement became centred upon improving efficiency by concentrating upon court structure. Throughout this time court delay was the major criterion of trial court performance and the court structure reform orientation was the accepted theory of State court organization for almost 70 years (Gallas 1987). Pound pinpointed delay as both the prime evil and measure of inefficiency, and the academic tradition then became an endeavour to put forward measures that would eradicate delay. During this time, “In keeping with conventional wisdom that the inadequacies of courts are related to their structure, efforts were advancedto reduce delay through unification of court systems, centralization of management and expansion of resources” (Cole 1993, p.91).

However, the research of the National Center for State Courts (NCSC) challenged the traditionalist view that delay was determined by such factors as court structure, size, and caseload per judge (Cole 1993). Courtools grew from the work of the NCSC and the original Trial Court Performance Standards (TCPS). It’s proposal of 68 measures was deemed too unwieldy and complex. Some years later the NCSC revisited the problem, and its deliberations led to the formation of Courtools in 2005, with ten performance measures designed to evaluate a small set of key functions of the court (Schauffler 2008).

However, the Courtools considered not only delay as a hallmark of inefficiency. Courtools was designed as a feasible set of measures selected on the basis of three criteria: correspondence to fundamental court values; balanced perspective on the work of the court; and feasibility and sustainability. The measures seek to illuminate success factors such as fiscal responsibility, employee satisfaction and engagement, client-customer satisfaction and effectiveness and efficiency of internal processes (Schauffler 2007).

Some academics have lauded the advent of Courtools. It is a move from the traditional judicial quality towards a system of court quality. It has been seen as a beacon for future court measurement and a format that could be adopted for countries worldwide with analogies drawn to the Dutch and Finnish systems of court measurement (Albers 2009).

3.3 EFFICIENCY AND EFFECTIVENESS

One major theme that has preoccupied the US debate on efficiency has been the proportion of time that trials make up of the courts' total business. Trials are assumed to take up a great deal of time, from selection of jurors to sentencing. Thus, if the number of trials is reduced, then more time is available to deal with the remaining court business. Defendants are offered substantial discounts on their punishment if they plead guilty. If defendants plead guilty, lengthy trials are avoided, and the defendant is dealt with expeditiously. Thus the more time the court gives over to trials the less efficient that court is and plea bargaining, by avoiding trials, is seen as a necessary virtue. A "judicial economy simply means that one goal of the judicial system is to conclude cases in an efficient and speedy manner...[and] without plea bargaining, it is widely believed that there would be an explosion of cases which in turn would overtax and disrupt the current legal system" (Find Law 2016). In the US the "central part of the story of modern

adjudication is achieving greater efficiency in processing and resolving cases,” which has led to trials vanishing to be replaced by plea bargaining and pre-trial diversion (Brown 2014, p.183).

The number of trials in the US criminal courts have diminished greatly, and plea bargaining is now the major form of criminal court resolution in the US. According to Bibas, plea bargaining was a device to save “everyone the time and expense of getting to a foreordained conclusion. But the exception has swallowed the rule. Today, roughly 94 percent of adjudicated felony defendants plead guilty; only about 4 percent enjoy jury trials, and the rest have bench trials. In misdemeanour cases, the disparity is even starker, with 99 percent or more pleading guilty.” (Bibas 2016, p.1058).

Although the idea, that plea bargaining helps to expedite matters in the US courts, is still very much the received wisdom in respect of efficiency, there have been strong challenges to that position. It has been castigated because of the lack of safeguards that are built into the system, “because it [plea bargaining] was supposed to be exceptional, no one bothered to build many safeguards into the process” (Bibas 2016, p.1059).

The premise that plea bargain is necessary to ensure enough court room capacity has also been challenged. Notable is a quantitative study done on the capacity of Florida's State court which argues that an increase in trials does not impact on court efficiency (Ferrandino 2014).

Other studies have also adopted the idea of time taken to dispose of a case as a measure of inefficiency. A study on the US appellate courts has based its recommendations for improving timeliness by remedying such determining factors as judicial burnout, size of jurisdictions, and judicial expertise (Christensen & Szmer 2011). The authors admitted

that their study in no way considered the effect of their recommendations may have on judicial decision making, which was left for a future study. It is claimed that judicial independence is a determinate of case length, and an examination of the Kansas courts suggests that courts with judges who enjoy less independence dispose certain types of cases more quickly (Goelzhauser 2012).

Some studies have linked inefficiency to a lack of judicial numbers, the idea being that the small number of judges are swamped by the number of cases coming through their courts (Dimitrova-Grajzl, Grajzl, Sustersic, & Zajc, 2012). However, other studies in judicially developed countries have found a weak correlation between judicial numbers and court efficiency (Lindquist 2007).

One opinion, held with equal vehemence by some observers in both the US and the UK, is the view that lawyers have been the root cause of court inefficiency. It is claimed that lawyers have a vested interest in maintaining a system which is inherently slow and cumbersome.

The main barrier to an improved more effective and socially more beneficial body of law and legal system is the system itself. An iron triangle of relationships among the courts, legislatures, and practicing lawyers drives strongly toward structured, built-in inefficiency and ineffectiveness because it is in the professional and unequivocal economic interest of the lawyers involved in all those functions to maintain an inefficient system. (Coates 1996, p.255)

It is claimed that defence lawyers in particular have a vested interest in a slow system. A study by the *New York Times* followed *closely* a defence attorney, compiled a list and examples of his filibustering tactics, and concluded that the true masters of delay are the defence lawyers, who rely on muddled memories, lost witnesses, and the passage of time for getting clients off (Glaberson 2013).

The argument is that lawyers will exploit an inefficient system for their own ends, filing motions, demanding further disclosure, quibbling on technicalities, with the result that the time spent on a case expands, the number of hearings increase, and so do the earnings of the lawyers. However, it is suggested that in the present EWCJS, the scope of such abuse has been curtailed with the introduction of stricter legal aid rules and a no adjournment regime in the courts (LAA 2016).

In contrast to traditional claimed determinants of efficiency, such as caseload, resources, trial mix, lawyer tactics, and outdated procedures, a different view has emphasised court leadership and court culture. Ostrom and Hanson examined the workings of nine different State Courts, differing widely in geography and social base. They eventually discounted the idea that the lack of resources is the root cause of inefficiency, and instead centred upon the court culture as being the main determining factor of a court's success.

The presence of more efficient work orientations among prosecutors and criminal defense attorneys underlies the tighter time frames. Attorneys' views about their work environment and toward each other's activities are linked to how timely their particular court is. (Ostrom and Hanson 1999, p.xi)

Court leadership and court culture were the determining factor in court efficiency, and the authors in their study took account of both timeliness and quality. Their findings were supported by previous work done on how a local legal culture (Thomas & Church 1985) and leadership and cohesiveness of the courtroom elite determines the efficiency of courts (Nardulli 1978).

It has been claimed that court delay cannot be ascribed solely to court size, caseload, case mix, or trial rate; that solutions based on court resources or formal rules and procedures are not sufficient to reduce delay; and that to reduce and avoid delay, court leaders must have a long-term commitment to active management of the pace of litigation (Gramckow, Ebeid, & Bosio, 2016).

It is vital to note that the aim of gaining efficiency in the courts has been met in the US by words of warning and requests for reflection. The pursuit of productive or technical efficiency alone conceived in terms of reducing delay in the courts and increasing the quantity of cases per time unit could have deleterious effects for “quantity has become all important; quality is occasionally mentioned and then ignored. Indeed, some commentators regard deliberation as an obstacle to efficiency” (Resnik 1982, p.431). Plea bargaining, even if it does prove to expedite matters in most US criminal courts, has come under fire as forcing citizens to waive their constitutional rights, (Wan 2007) and being the result of a rigid process that gives prosecutors too much bargaining power which leads to inequitable and unfair sentences (Stuntz 2011). It may also be the case that “defendants receive more lenient sentences where plea bargaining is used more extensively. This follows if defendants are awarded sentence or other concessions to induce them to plead guilty” (Rhodes 1979, p.361).

The drive for efficiency, of reducing delay, of the plea bargaining reduction in the number of trials, is also flawed because of its narrow perspective. In other words there is more than just efficiency at stake in the evaluation of the functioning of a legal system. It is therefore perfectly reasonable to suppose that the citizen consumers of legal services do not only want the legal system to be efficient, they also want it to be 'effective'.

Efficiency and fairness are central goals for the administration of criminal justice in the United States. Efficiency means economically applying available resources to accomplish statutory goals as well as to improve public safety.

Effectiveness refers to carrying out justice system activities with proper regard for equity, proportionality, constitutional protections afforded defendants and convicted offenders, and public safety. (Greenfield 1993, p.v)

It follows that measures which can induce efficiency may have undesirable or perverse consequences in that such measures may damage equity, fairness, proportionality, and ride roughshod over constitutional protections. Measuring a system on the basis of efficiency alone has its benefits, but it is a very short sighted evaluation of the court system as a whole.

Case-processing time has become one of the major criteria of trial court performance, akin to the use of arrest and recidivism rates in evaluating the police and corrections. The speed with which cases are processed has been viewed as having a determinative impact on numbers of cases handled, amount and types of resources required, and quality of justice allocated. (Cole 1993, p.91)

Case processing time produces evaluation criteria akin to productive or technical efficiency. It is in many ways natural, because it is straightforward to concentrate on what is easily measurable. Government agencies seldom focus on outcomes because assessment is so difficult. They usually take the simple way and measure processes and efficiency, rather than results and effectiveness (Osborne & Gaebler 1992). As Cole (1993) observes, the pace of case progression has become fundamental in measuring court performance. As such it is quite straightforward to measure. More complicated to assess, but still not too difficult, is the extra amount of resources needed to attain that increase in pace. What is more difficult, however, is to measure the effect the change that the speeded up processes have on outcomes, such as justice. Nevertheless, some US thinkers have acknowledged the valid contrast between efficiency and effectiveness. There has been much academic debate in the US on measurement of court efficiency, but also in some quarters a recognition that there are goals other than narrow efficiency which court systems should adhere to, the attainment of which would make the court 'effective' in the sense explained by Greenfield above.

3.4 US EFFICIENCY: THE NEW PENOLOGY, PLEA BARGAINING, AND THE DEMISE OF REHABILITATION

The US drive for efficiency is also mirrored in the demise of rehabilitation in the US from 1974 onwards. Robert Martinson's famous article, *"What Works? Questions and Answers About Prison Reform"*, had a profound effect on the course of US jurisprudence and punishment (1974). His conclusions were soon treated as fact by researchers, policymakers and the public alike (Sarre 1999). If rehabilitation programmes do not work then it is logical to abandon them. To persist in expensive programmes of psychotherapy and education is clearly inefficient and wasteful. The widespread influence of Martinson's

views was perhaps in part due “to their fit to various political orientation[s],” (Losel 1998, p.998) including those who wanted tough punishment and those [who] were against the cost of rehabilitation programmes.

The Sentencing Reform Act 1984 established an independent United States Sentencing Commission. The Act accepted the new wisdom regarding the futility of rehabilitation. “The 1984 act, indeed, rejected imprisonment completely as a means of promoting rehabilitation, and stated that punishment should instead serve retributive, educational, deterrent, and incapacitative goals” (Murray, 2002, p.5). As a consequence sentences became longer. But, not only did court sentencing become longer in order to incapacitate offenders, the flexibility in sentencing was reduced. During the Reagan period the scope of parole was curtailed and determinant sentencing policies led to harsh sentences (Harty 2012).

Hand in hand with the demise of rehabilitation, came the rise of the New Penology and the idea of Actuarial Justice (Feeley & Simon, 1992, 1994). The authors chart the optimistic ideas that held sway for most of the 20th century; the ideas which adhered to the central tenet that criminals could be rehabilitated and reformed. The emphasis of that thinking was upon the individual. However, the new system deals in aggregates and is about managing risks,

the new penology is neither about punishing nor about rehabilitating individuals. It is about identifying and managing unruly groups. It is concerned with the rationality not of individual behaviour or even community organization, but of managerial processes. Its goal is not to eliminate crime

but to make it tolerable through systemic coordination. (Feeley & Simon 1992, p.455)

Importantly, the New Penology meant longer sentences which resulted in larger prison populations.

Incapacitation promises to reduce the effects of crime in society not by altering either offender or social context, but by rearranging the distribution of offenders in society. If the prison can do nothing else, incapacitation theory holds, it can detain offenders for a time and thus delay their resumption of criminal activity. (Feeley & Simon 1992, p.458)

Even community sentences handed out by the courts were awash with the hue of the new penology, and “community-based sanctions can be understood in terms of risk management.” They are not rehabilitative but are mechanisms to maintain control, “over low risk offenders for whom the more secure forms of custody are judged too expensive or unnecessary” (Feeley & Simon 1992, p.461).

Efficiency is the prime driving force in the new regime for “it pursues systemic rationality and efficiency” (Feeley & Simon 1992, p.452). The efficiency programme is conceived to satisfy the dual aims of “managing costs and controlling dangerous populations rather than social or personal transformation” (Feeley & Simon 1992, p.465).

From the academic point of view there is much to criticise in the work of Martinson.

Methodologically, there are problems in that a comparative base line is lacking, for “since assessment procedures have been lacking in the past, treatments have not been well-defined, post-treatment follow-ups have been inadequate, and control groups have often

been non-existing, it is not possible to know with certainty whether *"nothing works"* (Kortsch 2000, p.8).

His concentration on underfunded projects and projects that were poorly manned meant that those projects never stood a chance of producing results. The growth of meta-analysis has shown that rehabilitation can have putative and beneficial effects and there is now a resurgence of rehabilitation methods in the US (Cullen 2012, p.97). However, the impact has been that of a ratchet and there is widespread agreement that Martinson's work helped to lead the US judicial system to longer and more inflexible sentencing (Sarre 1999).

Furthermore, it is observed that

The introduction of harsh determinate sentencing schemes—including sentencing guidelines, mandatory minimum penalties, and three strikes laws—has led to an explosion in the prison population. Disillusioned with the ability of penal science to rehabilitate offenders, the prison system aspires to do little more than warehouse and incapacitate law-breakers. (Lanni 2005, p.361)

The work of Feeley and Simon was essentially a reporting of their observations of the changes undertaken in the US jurist system. The harsher sentencing that has arisen with the demise of rehabilitation has also strengthened the plea bargaining system.

"Mandatory minimums and sentencing enhancements have given federal prosecutors new power to coerce pleas and avoid trials" (Ferguson 2013).

The US criminal justice system, with its large prison population and entrenched plea bargaining, earns the withering account given by Stuntz. Thus the efficiency achieved in

the penal system of 'managing' groups feeds back into the courts via sentencing policy and procedures. If rehabilitation does not work, then sentencing policy can be more simple and straightforward. Sentences become mandatory and less flexible in that at least the system can incapacitate the guilty and hereby protect the community. In addition, the harsher sentences and lack of discretion given to judges has strengthened the hand of prosecutors in plea bargaining. The potential scope for more plea bargaining is increased, and the prospect of time consuming heavily resourced trials further reduced. Hence the greater efficiency of the penal system in terms of group management, feeds back into the courts to strengthen plea bargaining and court efficiency conceived in terms of trial number reduction.

According to Stuntz, the US criminal justice system is riddled with inefficiencies and is hardly functioning as a justice system. It is devoid of the rule of law, wildly unjust, and the harshest legal system in the history of democratic government (Stuntz 2011). Many of the conclusions in Stuntz's comprehensive work received staunch support from no other than the recent US Attorney General, Eric Holder. In 2013, and whilst still Attorney General, in a speech to the American Bar Association, Holder pointed to the "vicious cycle of poverty, criminality, and incarceration [that] traps too many Americans and weakens too many communities. And many aspects of our criminal justice system may actually exacerbate these problems, rather than alleviate them" (Holder 2013). The speech castigated the rush to incarcerate which often served no good reason, with "widespread incarceration at the federal, state, and local levels [being] both ineffective and unsustainable." The speech supported rehabilitation, resettlement schemes for ex-prisoners, diversion programmes, and a more flexible approach by prosecutors. Mandatory prison sentences and sentence inflexibility was regretted as adding to the problems of the system which had to be more

flexible. Rehabilitation was also rehabilitated and, “to be effective, federal efforts must also focus on prevention and re-entry.” Although the Attorney General did not use the term, it was, overall, an admission that the US justice system was ‘broken.’

3.5 CRITIQUE

There appears to be an accord within the US academic writings pertaining to efficiency. That delay in the legal process is wrong, wasteful, and unjust. However, despite all the words written on the subject, very few works make explicitly clear the meanings of efficiency adopted.

Absence of delay, or timeliness, is seen to be the hall mark of an efficient legal system, and most commentators take it almost as self-evident that the eradication of delay is the mark of improved efficiency. The eradication of delay is usually taken to mean the speeding up of the legal process, and the US works therefore pay a great deal of attention to technical efficiency. The various meanings of efficiency employed by the writers have, in the main, to be gleaned from the works. There is a lack of clear definitions as to the meanings of the term efficiency, and the reader is often left to deduce what is meant. Examples will illustrate the attitude of some American writers. Thus Charles Clark from the Yale Law School wrote in 1961 that he was “going to talk about present-day plans to make the courts more productive and easily operable, that is, to make them more efficient” (Clark 1961, p.489).

Thus being more productive is being more efficient, presumably producing more for less, but there is no clarity as to whether the idea of being more productive is technical or productive efficiency. This matters. Technical efficiency may improve output but the introduction of new machinery and processes may be very expensive, leading to a

possible reduction in productive efficiency. Elsewhere, he goes on to talk of “natural measures of efficient provision for effective law administration” (Clark 1961, p.495). However, he never explains what these self-evident natural (and therefore obvious) measures are.

He goes on to plead for greater resources to improve efficiency, “there must be additional judges, courtrooms, and courthouses to care for the population explosion we are now witnessing” (Clark 1961, p.496). However, there is no explanation of how resources are related to efficiency or how they would improve efficiency. Increasing resources can actually lead to inefficiency, for example when diseconomies of scale result.

As noted *supra*, Coates puts the cause of inefficiency down to the activities of the legal profession because it is in their vested interest that the system is inefficient. Lawyers also act as a brake on the utilisation of technology. The work consists of a series of injunctions to improve efficiency without a coherent account of efficiency. However, despite the lack of clear exposition he is adamant how such inefficiencies can be eradicated. “If one pictures the legal system as an information machine, modern technology could significantly improve its efficiency and effectiveness” (Coates 1996, p.258).

Even when sophisticated statistical analysis is used to gauge efficiency, as in the study by Dalton and Singer (2014), the base line idea of efficiency is limited to only trial length which is given as the elapsed time from a case’s initial filing to its final disposition.

The same considerations apply to the work of Ferrandino in his statistical examination of the Florida courts and his critique of the *Packer Theorem* that trials slow down the court process and put a burden on resources (Packer 1964). Despite its erudition, and its claimed refutation of Packer, it is limited in its analysis to the narrow confines of

productivity per judicial input. Ferrandino admits that there are more comprehensive measures of court inputs but he was hampered by a lack of reliable data (2014).

Sue Dosal, who reported upon the deliberations of a conference, assumed that efficiencies were self-evident. The closest we got to an elucidation of the ideas of efficiency was the discussion on court unification which had led to cost efficiencies in both time and travel (Dosal 2017).

Even when American writers make efforts to provide definitions, the result is not always a happy one. Brown in his study of perverse effects of efficiency measures produces a term he calls productive efficiency but, in the footnote, he gives the meaning for technical efficiency. In the same footnote, in explaining efficiency, he gives a Pareto meaning from an Economic dictionary (Brown 2014, p.190). None of the terms are clearly explained and the result is confusion.

As stated *supra*, efficiency is not the only criterion upon which to judge a court or a legal system. There is, in the Greenfield sense, the idea of effectiveness and justice. Resnik, writing in 1982, said that the idea of quality in judicial decision making was paid lip service. It is ventured, that if she were writing today, there would be no viable change in her observation (Resnik 1982). The academic works on efficiency in the US courts generally remain focussed on technical efficiency and delay and lack a proper examination of the wider impact of efficiency measures. However, some works have made efforts to evaluate measures for efficiency with an appraisal of the effects such measures have upon the fairness of the court process. For example, in their study of nine state courts, Ostrom and Hanson attempt to evaluate the quality of court decisions by mainly relying upon the length of time allocated to a case, hence the greater the amount

of time the case has received the more care that case has received. That is a rather weak supposition. Fundamentally they admit that measuring the quality of judicial decisions is very difficult to achieve (Ostrom and Hanson 1999).

The aforementioned Courtools tries to address the fairness and justice of the court process through a series of surveys of courts users. However, the core measurement of justice is limited to only five questions and, although the tools may go some way in estimating client customer satisfaction and perceptions of fair treatment, the whole system of Courtools measurement is heavily centred upon such factors as fiscal responsibility and efficiency of the internal processes. Measures 2,3,4,6, 7, and 10 focus on factors such as delay, speed of the process, and cost of the case. In other words, they concentrate on those items which can be easily measured.

Moreover, the Courtools matrix is only partially applied in a handful of state courts. Despite the impetus of Courtools towards standardisation in both practice and procedures, its partial implementation means that the US court system still remains a patchwork quilt of varying practices, procedures, and processes.

There is a dearth of US academic work that focuses upon the core of our investigation, namely the efficiency of the courts in a time of austerity. Nevertheless, in 2017 the Rand Corporation held a conference called Discount Justice. The conference examined the topic of State Court belt-tightening in an era of fiscal austerity. Some remedies voiced were not new and echoed Pound, such as the idea of saving money by centralising administrative functions. One pertinent lesson from the conference was the effect that cuts to legal services and closure of courts on communities. There was recognition of the trade-off between geographical access and efficiency, e.g. hub courts. We did learn from

the conference that most courts, after suffering cuts, had now had their funding levels re-established. The conference taught the observer much about the political power interplay between the courts and the state legislators, including the claim that California State had not reinstated the level of funding to the courts as a punishment to the court authorities. There was concern that lack of funding had reduced the services offered by the courts. However, there were no definitions or real elaboration on the concept of efficiency, and no central discussion of how austerity had affected the efficiencies of the courts (Greenberg & Cherney 2017).

The influence of the concept of efficiency, even in a vague form, has greatly influenced the US court and penal system. Plea bargaining is prevalent in all US courts, and the ubiquitous practice stems from the idea that trials are a cause of inefficient throughput of business in the courts. In addition, Martinson's ideas that nothing works leads to the conclusion that certain sentencing practices are ineffective. Hence, for the sake of efficiency, such sentences should be abandoned by the courts.

The discussions of US academia on court efficiencies primarily concentrate on court organisation, processes, and judicial leadership. Despite some recognition of the importance of local legal culture or 'courthouse workgroup' (Feeley 2013), it is a grave limitation that they do not see the efficiencies of the US courts as a function of the efficiencies of those agencies that use the courts. Inefficient agencies, such as the prosecution, mean that the business of the courts will also, *ceteris paribus*, be limited in the efficiency achieved.

CHAPTER 4

EFFICIENCY AND THE COURTS: ENGLAND AND WALES

4.1 INTRODUCTION

The previous chapter provided the academic background to ideas of efficiency in the courts. The US efficiency study provided both a historical context and a foundation for the concepts of efficiency based primarily on technical and productive meanings.

Furthermore, it also shows that many of the remedies proposed to increase efficiency cannot be universally applied, being applicable as they are to a US system which requires reorganisation and consolidation of its courts.

This chapter deals with the English and Welsh experience and provides the material essential to the fundamental undertaking of the project, namely the governmental measures, policies, and plans in respect of the attainment of efficiency in the EWCJS in a time of economic austerity. The material and literature to be critiqued is provided by the government and its various departments and agencies. The remainder of the thesis should be seen as that critique.

The second section is centred specifically on the EWCJS and the implementation of governmental measures to attain efficiency in a time of austerity. The third section discusses the New Public Management (NPM) which underpins the English CJS efficiency programme. The fourth section discusses the UK government's linking of the concepts of justice and efficiency.

The fifth section attempts to map out the flavour of the changes and the response to them by examining what the press calls the 'crisis in the courts'. The sixth takes a view of the reports by Lord Leveson and the NAO on the efficiency of the English criminal courts. As in the US, there is a dearth of commentary in respect of the central issue of efficiency of the CJS in a time of austerity. However, three authors deserve particular mention. David Faulkner in his essay, *Criminal Justice and Government at a time of Austerity*, provides a well mapped overview of the concept of austerity as it could be applied to the EWCJS. Jane Donoghue, within her excellent portrayals of government policies as applied to the magistrates' courts, also traces the tenets of NPM as applied to the magistrates' courts in this time of austerity. Jenni Ward has conducted recent research upon the workings of TSG in her book *Transforming Summary Justice*. She criticises what she calls 'managerialism', the movement behind the speeding up process in the magistrates' court. Despite the scholarship of Donoghue and Ward, their works offer only a partial analysis of what has transpired in the time of austerity, concentrating as they do upon the procedures of the magistrates' courts. In contrast our analysis uses a range of economic efficiency concepts whose aim is to give a comprehensive perspicuous depiction of the effects of austerity upon the criminal courts and the EWCJS.

4.2 UK RECENT EXPERIENCE

The English criminal legal system is more centralised and consistent than the American, with its overlays of State and Federal Court organisations and diverse processes. Thus in the US imposing standard structures and organisations together with a centralisation of administrative functions would yield advantages. In the EWCJS there is no comparable gain for efficiency because that standard organisation and structure already exists.

Measures for efficiency gains have thus centred upon the court process itself and the speeding up and streamlining of internal court procedures.

The MOJ and the HMCT spell out their visions and guiding criteria, and from their reports and plans, the emphasis on measurement and the application of productive and technical efficiency can be discerned. See, for example, the HMCTS Business Plan 2011-2015 where it seeks “to work to streamline and reform the criminal justice system... developing improved and more efficient business processes, and [provide] lean working in the Criminal Justice System” (HMCTS 2011, p.6).

As stated in Chapter 2, the criminal court system, like many government run agencies and departments, has been subject to the dual impact of financial cuts and a drive for efficiency (MOJ, 2014a). The move to greater efficiency, which had come to the fore under the Blair governments, gained greater impetus with the advent of the coalition government and the need to deal with the financial deficits. The cuts have been large and deep. The MOJ in its Improvement Plan of 2014 states baldly: “Our extensive reform programme covering all areas of the justice system including back office functions has reduced net spend by £1.7bn or 19% in real terms in 2013/14 compared to 2010/11, and is expected to reduce by a total of over £3bn or 34% in real terms by 2015/16” (MOJ 2014a, p.3).

There is little doubt that the momentum towards the goal of greater efficiency is triggered by the deficit reduction programme which, boasts *Transforming the Criminal Justice System* (TCJS), has led to “developing new and more efficient ways of operating” (MOJ 2016c, p.4).

The major spur of the drive for change is clearly financial,

The Government has made it clear that our highest priority is tackling the fiscal deficit. The criminal justice system cannot be exempt from that challenge, and must make its contribution. But this provides an opportunity to reject outdated thinking that 'more money is the only answer'. Whether in good times or bad, it is right that our public services continually strive to achieve better for less. (WPSS 2012, p.20)

Efficiency is the central concept to the whole of the government's CJS strategy, and is expressed as one of the five strategic priorities for reform of the MOJ that aims to, "transform the Criminal Justice System and the courts, making them more flexible and efficient" (MOJ 2014a, p.3)

Furthermore the Ministry intends to, "Embed a stronger focus on the importance of efficiency and value for money" (MOJ 2014a, p.4). The MOJ wants to cut delays via technical efficiency yet obtain value for money, in other words also attain productive efficiency. It could be said that the policy is avowedly aimed at technical efficiency but implicitly, because of austerity, it intends to reduce costs and thereby increase productive efficiency.

However, it would be a distortion to portray the strategy as one only of an efficiency drive to the exclusion of other important goals. In the government document Transform the CJS Strategy and Action Plan (MOJ 2013), there are seven desired outcomes:

to reduce crime;

to reduce re-offending;

to punish offenders;

to protect the public;

to provide victims with reparation;

to increase public confidence, including among victims and witnesses;

to ensure the system is fair and just.

Nevertheless, the government makes efficiency a *sine qua non* for the attainment of all the outcomes, claiming that “we cannot hope to achieve our shared outcomes unless we have a more efficient system” (MOJ 2013, p.14). The efficiency adopted is that of productive / technical efficiency, the key being to both reduce delay and reduce cost in the legal system.

Although the government's policy presents the seven outcomes as the aims of its strategy, it puts efficiency as the core, the lubricant of that strategy, without which those outcomes will not be attained. It is essential to the authors of TCJS that we have a “CJS which is faster and right first time” (MOJ 2013, p.6). It is claimed that radical investment in the EWCJS, centred upon digital technology, could bring marked future benefits, in terms of technical and productive efficiency.

Indeed from the figures published it seems that the government expects that the costs of the high tech investment will, through greater efficiencies, recoup the principal of the investment within four years (Gov.uk 2015). This will represent a return on capital employed of at least 25 % p.a. At the time of writing, no detailed calculations have been published to establish how the remarkable return on capital employed will be achieved. The expected return on government projects are to be expected within “a range of 6–8 percent for different, “typical” government projects...[with an] acceptable rate ...as low

as 3.5 percent” (Zerbe 2014, p.10). Admittedly, Zerbe’s findings are from an analysis of US government projects, but there seems to be no reason not to take his figures as a guideline for returns on governmental projects in general. Additionally, one is also entitled to be sceptical and wary of UK governmental projections because of the 'hidden' cost involved, for instance redundancy payments as the workforce is reduced. Furthermore, the history of UK governmental commissioning of computer systems has been replete with disappointing computer system failures and waste (Hayhow 2017).

4.3 UK NEW PUBLIC MANAGEMENT LEGACY

Under New Labour, the legal system was seen as archaic and antiquated, especially by the then PM Tony Blair who, in his conference speech in 2005, stated, “The system itself is the problem. We are trying to fight 21st century crime - ASB, drug-dealing, binge-drinking, organised crime - with 19th century methods, as if we still lived in the time of Dickens” (Blair 2005).

The remedy was to adhere to the principles of New Public Management (NPM), “like other public services, criminal justice was to be managed in accordance with the principles of modern public management based on targets, markets and contracts” (Faulkner 2010, p.5).

NPM, a term formally conceptualized by Hood (1991), broadly denotes the government policies since the 1980s that aimed to modernise and render the public sector more efficient. The basic hypothesis holds that market oriented management of the public sector will lead to greater cost-efficiency for governments. Ferlie depicts NPM as involving the introduction into public services the ‘three Ms’: Markets, Managers and Measurement. The adoption of the three Ms will increase efficiency and make the public

sector more accountable (Ferlie, Ashburner, Fitzgerald, & Pettigrew, 1996). NPM was claimed to be the most dominant paradigm in the discipline of public administration (Arora 2003). It conjures up an image enmeshed with a minimal government, debureaucratization, decentralization, market orientation of public service, contracting out, privatization, and performance management (Kalimullah, Ashraf Alam, & Ashaduzzaman Nour, 2012).

The major tenets of NPM as applied to the law are described, *inter alia*, as using models taken from the private sector, hands-on management, generalist managers rather than professionals or specialists, and the adoption of competition, contracts and the construction of markets (Faulkner 2010).

Fitzpatrick, in his study on the magistrates' court in England and Wales and the impact that NPM has made specifically upon the criminal courts, made the observation that there is an “emphasis upon the “holy trinity” of economy, efficiency and effectiveness; the desire to satisfy “consumer” needs; the measurement and audit of performance; the comparison of performance between different service-deliverers; inter agency working; and the involvement of the private sector” (Fitzpatrick, Seago, Walker, & Wall, 2000, p.1).

The doctrines of NPM and the central concept of efficiency made an immediate impact on the business and organisation of the courts, for,

As in all walks of public life during the 1980s and early 1990s, efficiency and cost effectiveness became the yardsticks against which the courts were measured. Magistrates’ Courts Committees began to achieve efficiency and

financial gains, *inter alia*, by increasing use of information technology and by reducing the number of clerks. (Fitzpatrick et al, 2000, p.6)

Admittedly, the coalition government divested itself of Public Service Agreements after 2010, which were considered elements of NPM in practice. NPM, however, in the legal system is as strong as ever.

However the removal of central performance targets...has not meant that new public management has gone...local commissioners continue to set quantitative goals for services and the Government's Departmental Business Plans are not dissimilar to the previous performance regimes. (Bowen & Donaghue 2013, p.15)

The theoretical and doctrinal underpinning of NPM to the actions of present Government policy towards the courts is clearly depicted in the WPSS. Targets from the paper can be read off as if it were a NPM tick list for the maladies of bureaucratic organisation. Such a list, congruent with Government publications, includes, *inter alia*, budget cuts, democratization and citizen participation, customer orientation, decentralization, competition, contracting out, strategic planning and management, and greater use of information technology (Gruening 2001).

The prime target for NPM is inefficiency, and the WPSS has the court and EWCJS technical inefficiency firmly in its sights,

The criminal justice system is regularly criticised for operating slowly, for its frequent delays, its lack of transparency, its complexity and for its failure to make the best use of its resources...The legal system is also far too bureaucratic, and Victims feel that the system is overly bureaucratic and confusing...It is not just the

structure of the criminal justice system that is complex. It also employs complex and bureaucratic processes that can lead to lengthy delays and long drawn-out proceedings. (WPSS 2012, p.12)

According to the White Paper, in addition to bureaucracy and complexity, one of the causes of the inefficiency is that we have a highly centralised criminal justice system, and it follows therefore that the system should be decentralised. In addition, there is a weighty emphasis on customer orientation which requires, in turn, greater transparency and responsiveness. Greater participation and democratisation is partly satisfied by the inauguration of elected Police Commissioners which also provide a needed local dimension to the legal structure.

Part of the solution to the woes of the justice system is the lack of incentive and its need for market orientation. In discussing the probation system, the WPSS makes it clear that there is an intention to “further extend the principles of competition” (WPSS 2012, p.23).

The NPM view of the market was also predominant in government justice policy and “developing markets in the operation and delivery of criminal justice services was central to policy in England and Wales” (Garside & Ford 2015). An overt example of the NPM requirement of strategic planning and management is given by the aim to establish a good inter agency working system, which itself will increase efficiency.

Part of the solution is to get the various agencies of the legal system working together, thereby increasing the efficiency of the whole. Given the fiscal context, this is a significant challenge. But one thing we have learned is that throwing money at the criminal justice system is not the solution. The decisions that the agencies take on a day-to-day basis have implications for the workloads, and the

costs, of their partners. Their common interest in reducing their costs therefore provides a strong incentive for them to work much more effectively together.

(WPSS 2012, p.11)

This position again challenges the narrow view of parochial independent agencies with their 'silo' mentality, each working to their own ends and agenda, and opens the debate up into the wider arena of cooperation and resulting symbiosis. The desired effect is a 'seamless' legal system with each agency, because of cooperation, increasing the efficiency of the whole legal system by more than the sum of their individual inputs.

The framework of the government's programme has been NPM, and the centre piece of the framework is efficiency, itself necessitated by the need for budget cuts. A cynical observer may argue that governments, playing the political game, will dress up budget cuts as a programme of efficiency. Of course, budget cuts may indeed produce a genuine drive for efficiency, namely: to do more with less.

4.4 EFFICIENCY AND JUSTICE

The government take the view that in attaining efficiency unnecessary delay will be eradicated, and from the eradication of delay follows the effectiveness of the CJS, and the attainment of many of its goals. The realization of efficiency and, thereby, the eradication of delay is not just desirable, it is essential for the attainment of justice itself. In the forward of the WPSS, Nick Herbert, the then Minister of State for policing and criminal justice, writes,

...a basic principle of justice [is] that it should be delivered without delay. Magna Carta asserted that "To no one will we refuse or delay right or justice." Justice delayed is justice denied, especially to the victims of crime. Yet our criminal justice

system routinely tolerates delay. On average five months elapse between offence and sentence in a magistrates' court... fundamentally, swift justice is in the interests of victims, witnesses and the public. (WPSS 2012)

In the US, there was a distinction between the policies that produced efficiencies and the possible clash those policies have with the attainment of other goals including justice and fair process. In England, the government has conflated the expeditious and the just. In eradicating delay one is attaining justice, the pursuit of efficiency is, by *fiat*, also the pursuit of justice.

The realization of efficiency is, therefore, necessarily linked to the further attainment of other higher goals. It is the bridge whereby the system also becomes effective in the sense of that term used by Greenfield *supra*. Thus delay is not only inefficient; it is also unjust and, furthermore, reduces the deterrence element of sentencing. Punishment should be delivered quickly if it is to have effect on wrongdoers, since, "justice needs to be swift if it is to be effective. Offenders need to be made to face the consequences of their actions quickly" (WPSS 2012, p.6). Being efficient and ridding the courts of delay has, at least, a twofold effect. It is essential for the maintenance of justice, in particular the ensuring justice to the victims of crime; and also in making punishment and sentencing effective.

Too often we see offenders who, rather than having been on the receiving end of swift justice, have waited months to be brought before the courts during which time they have committed a string of other offences which need to be prosecuted. (WPSS 2012, p.12)

The idea encapsulated in WPSS, that prompt punishment is more effective punishment, has some academic backing. The idea is not new, for consider Ecclesiastes 8:11, “When the sentence for a crime is not quickly carried out, people's hearts are filled with schemes to do wrong” (NIV).

A more up to date analysis is provided by Professor Kleiman, who argues that random punishment that is delayed, however severe it may be, skews the cost-benefit thinking of offenders (Kleiman 2005). Accordingly, swift and certain punishments are more real and potential crimes are more likely to be deemed not worth the risk by a potential offender. Kleiman's views are supported by the findings of others, for “delay of punishment is of paramount importance and is probably largely responsible for the apparent ineffectiveness of our current punitive systems” (Singer 1970, p.420).

Furthermore, it is considered that the timing and frequency of punishment are critical elements in law enforcement (Perry, Erev, & Haruvy, 2002).

The efficiency drive must not be half hearted, it must not be content with just improvement, it must, “drive continuous improvement of performance and efficiency across all aspects of the administration of the courts and tribunals” (HMCTS 2014, p.5).

This is a clear application of NPM principles to managing the legal system, for, “under the regime of performance measurement, public sector organisations should be committed to an ethos of continuous improvement in levels and standards of service delivery” (Kalimullah et al 2012, p.12).

Again, there is more than just a drive for simple efficiency, because the realization of efficiency is linked to the attainment of other goals. These goals include maintaining in being the very fabric of the legal system itself, for the aim is to run an efficient and

effective courts and tribunals system, which enables the rule of law to be upheld, and provides access to justice for all (HMCTS 2014).

Nevertheless, despite these observations and the belief that justice delayed is justice denied, there is no contradiction in holding to the position that the measures adopted to bring swiftness to the system can also have a deleterious effect on the proper deliberation of a case and, therefore, upon justice. In other words, in practice, the pursuit of efficiency and the maintenance of justice can, in both theory and practice, stand in stark opposition to one another.

4.5 COURT CRISIS

The measures, both proposed and adopted, in England and Wales since 2010 have led to conflict with the legal professions and has led to a 'crisis' in the courts with the government and MOJ measures being opposed by the legal professions (Lucas 2015).

Critics of the professions argue that the more archaic the system is, the more unnecessary work it generates, and the more income there is for lawyers. Thus, it may be argued that the nature of the crisis is, at least partly, caused by the self-interest of lawyers who are desperately trying to protect their own restrictive practices and vested interests (Mount 2013). It must be pointed out that the view of the lawyer pariah as a target for reform gained momentum under New Labour and the premiership of Tony Blair whose views on the maladies of the criminal justice system were uncompromising. The government came to regard criminal justice in England as a 'failing system', not capable of doing its job in a modern, globalised world. The Prime Minister Tony Blair saw it as unable to protect the public from crime or to give proper consideration to its victims, and

declared that “of all the public services we inherited in 1997, the most unfit for purpose was the criminal justice system” (Blair 2004).

The restrictive practice of lawyers was a particular target for reform.

Labour will move against "fatcat" lawyers in a second term, it emerged last night, with plans being drawn up to implement recommendations from a report by the office of fair trading which criticised barristers' anti-competitive practices. One [minister] was quoted as describing lawyers as "the last bastion of restrictive practices." (Perkins 2001)

Although there is some academic work which relates to the efficiency of the English criminal courts, if not directly then obliquely, most of the discussions about efficiency comes from the contenders in a dispute that has riven the EWCJS for at least the past ten years. On one side stand the government and the MOJ, and on the other the legal and other professionals, some pressure groups, and some members of the judiciary.

There is currently a great deal of grey literature making reference to the 'crisis' in the English courts but much of this literature is from the press. There is the replication of press releases from interested and non-partial parties, the avid reporting of condemnatory comments made by judges and statements made by politicians.

Spokespersons from the Bar, the Law Society, the MOJ, and even the observations of individual lawyers receive the attention of the press and their remarks as to the crisis are often reported in full.

Despite some well balanced and thorough occasional commentaries by the quality press, this type of grey literature is often just reporting and there is usually little comment or

real analysis of the issues raised. Nevertheless, the literature sets the scene depicting as it does the purported turmoil that is present in the court system.

Therefore the debate on court efficiency and the effects of the measures adopted or proposed to attain that efficiency have been mainly conducted outside the academic arena and confined to the main protagonists of the government and the legal professions. The Bar as a body has been outspoken on the crisis in the courts, but it does to its credit conduct its own research into important topics that affect the workings of the legal system. It is important to realise that the literature produced by both sides has to be understood in the context of the history of the government's attempts to cut the budget for the MOJ as a whole and the courts in particular.

Paradoxically, the contenders in the debate may agree on the first premise, namely that we may have a criminal legal system which is falling apart and not fit for purpose, that is consistently failing victims, defendants, and witnesses alike (Gove 2015). But the debate for some should be centred upon discussions regarding a costly and inefficient system which needs to be trimmed in accordance with the principles of NPM, a need to put the public purse before the restrictive practices that abound in the system and contribute to the high cost to the taxpayer who are being fleeced by “fat cat” lawyers (Faulkner 2010). It has been traditionally argued by governments that the nature of the crisis is fundamentally caused by the self-interest of lawyers who are desperately trying to protect their own restrictive practices and vested interests (Faulkner 2010). On the other hand some lawyers and the Bar state that the real issue should centre upon the administration of justice, the proper preparation of cases by both the prosecution and the defence in order to ensure that justice is being done, that the present expertise of the

legal profession is maintained, and that the welfare of victims and witnesses should be considered and improved upon, which is not presently the case (Robins-Grace 2017; Shaw 2014; Coleman C 2015; Bowcott & Meikle 2013). The debate is conducted in mainly sweeping terms, of the maintenance of the rule of law, the viability of the legal profession, and the preservation of justice itself (Robins-Grace 2017).

The debate has generated much heat and passion. Five years ago it would have come as a total surprise to witness 'strikes' by the legal profession and overt criticisms of governmental policies by senior judges. Understandably, of all the measures proposed or introduced by the government in the realm of change, the legal aid changes have proved the bloodiest battle between the government and the professions.

A lynchpin of the efficiency strategy is the transforming of legal aid, the aim being to “Create a sustainable Legal Aid system, which is more affordable and more effective” (MOJ 2014a, p.3). The emphasis is on the sustainable, what can be afforded.

Accordingly, as part of this priority the Department introduced changes to the scope of legal aid and the criteria for eligibility (NAO 2013).

In support of its contention that measures to curb legal aid are necessary and prudent, an NAO report shows, in diagrammatic form, that the three highest legal aid expenditure countries per head as a proportion of GDP, 2008, were Scotland, England and Wales, and Northern Ireland (NAO 2013; Appendix B).

However, in response it has been said that the government's stance on this matter is disingenuous, that the English adversarial system places tasks upon lawyers that would, in other countries, be carried out by officials and civil servants (Paterson 2012). This view seems to be borne out when total annual public budget allocated to all courts,

prosecution and legal aid as a percentage of GDP per capita are compared. In such a comparison, England and Wales are at exactly the average per capita expenditure (NAO 2012, fig.19; Appendix C). In such a context, the legal aid provision seems simply a necessity to maintain the adversarial system; and that system as a whole does not appear to be expensive compared to the cost of maintaining other national legal systems.

Nevertheless, in England and Wales, the strategy on legal aid included measures to reduce fees, limit eligibility of applicants, require defendants to contribute to the costs of representation, and a tendering for legal aid work based on price competition. The legal aid tendering process was abandoned by the government in 2015, but if implemented it would have transformed the structure of criminal solicitor firms in England and Wales. Its likely result was “the closure of a large number of, mostly small, legal firms” (Garside 2015, p.23).

The Bar, in collaboration with others, produced the short and pithy 'A Manifesto for Justice,' which argued for the strong link between legal aid and justice, for “the justice system underpins the principles of liberty and democracy, the rule of law, and our human rights and fundamental freedoms.” Furthermore, the paper is stridently opposed to cuts in legal aid, believing that legal aid is “an indispensable element of a just and fair society.” The Manifesto goes on to argue that the country is past the point at which further cuts can be made to criminal legal aid, warning that if the cuts were to continue, victims, defendants would suffer (Bar Council 2015, pp.1-2).

The points raised by the Manifesto seem fundamental to the debate concerning legal aid, and they bring to the fore the effects on justice that cuts in the budget may have. The government has not involved itself in answering the points raised, other than reiterating

its view that legal aid provision in England and Wales is higher than in other countries, and that legal aid will go where it is most needed. The Manifesto also emphasises the need for a viable legal profession.

Being a criminal legal aid practitioner is no longer regarded as a viable career path for young professionals. The result will be fewer advocates who are able to prosecute and defend the most serious cases, and the pool of experienced and able practitioners, from whom the next generation of judges is drawn, will evaporate. (Bar Council 2015, p.5)

In addition, the Law Society's deep concern was that "the cuts will leave some areas of the country without any access to criminal legal aid" (Caplen 2015).

Despite the protests and 'strikes' legal aid provision continued to fall as a consequence of government measures in respect of fee reduction and eligibility rules. However, the response of solicitors to the tendering proposals was vigorous with at least ninety nine actions challenging the government actions in the courts (BBC 2016).

Faced with legal challenges the then Justice Minister, Michael Gove, rethought the proposals, admitting in a written statement to Parliament in January 2016 that,

...it has become clear, following legal challenges mounted against our procurement process, that there are real problems in pressing ahead as initially proposed. [The opposition of the legal profession was paramount in the rethinking of the proposals for] My decision is driven in part by the recognition that the litigation will be time consuming and costly for all parties, whatever the outcome. I do not want my department and the legal aid market to face months if not years of continuing uncertainty, and expensive litigation, while it is heard. (Gove 2016)

Accordingly, cuts to legal aid fees for duty criminal solicitors who represent suspects in police stations and magistrates courts was to be suspended for 12 months. As well as surrendering the 8.75% fee cut, the controversial contract-tendering procedure which would restrict the number of law firms permitted to do duty legal work was also abandoned (Bowcott 2016).

The retrenchment of the legal aid proposals by Gove marked at least the temporary demise of the radical reshaping of criminal legal aid in accordance with the precepts of the market, as observed, “the tenacity of the government in its attempts to introduce price competitive tendering for criminal legal aid speaks volumes about its general commitment to market processes as a means of pricing and assigning the delivery of key public services” (Garside 2015, p.23).

However, it is too soon to pronounce a victory of the legal professions over the government and the abandonment of a large segment of market strategy as applied to the criminal justice system. When Gove was Lord Chancellor he had a mission and a vision and also talked in the same messianic manner as the Bar Council. Like the Bar, he said he wanted to maintain the rule of law in addition to making the justice system work for everyone in the country. He argued that his measures were necessary because the present system is archaic and unjust. Lawyers have responsibilities to make the system work by making greater contributions to the system, perhaps through more *pro bono* work (Gove 2015). Gove, in his statement, made clear that the proposals in regard to legal aid had only been postponed for a year. It proved a temporary respite. The participants in this research stated that the recent legal aid contracts have reinserted the second tranche of legal aid cuts. The cuts in legal aid which were announced in 2012 were intended to

cut £450 million a year from the legal aid budget. Legal aid is now £1.1 billion less than it was in 2005/06 and, under increasing pressure, the recent ex Lord Chancellor, David Liddington, had committed his department to look at the cuts imposed in 2012 (Bowcott 2017).

4.6 LORD LEVESON AND THE NATIONAL AUDIT OFFICE

It is essential to refer to the recent reports by Lord Leveson and the NAO on the efficiencies of the EWCJS. Mention has already been made to the Leveson report. The Leveson report gives an overarching view of the state of the courts from a procedural point of view, and provides detailed recommendations on how the courts should be reorganised. The report recognises that the EWCJS is undergoing great changes in a time of austerity, when it has also been the subject of 'transformation exhaustion' over the past twenty years. Over that period more than 4000 criminal offences have been added to the statute book (Appendix D). Leveson adopts, and supports, the government thinking in *Transforming Summary Justice* and *Transforming the CJS*. His report encompasses the whole case progression from the police gathering of evidence, charging, preliminary proceedings and the trial. The emphasis is on 'getting it right first time,' correct charging by the CPS and the police, early liaison between the prosecution and the defence, identified lawyers for both the prosecution and the defence to ensure continuity and case care. Adequate disclosure by the prosecution is essential to contribute to a streamlined and seamless procedure through the courts, with legal aid incentives to help with compliance. He warns that delay in some circumstances can be a defence lawyer tactic. He endorses investment in cost saving IT systems and coordination between the different agencies that constitute the EWCJS. He provides a warning that, in the interim, the

government must provide extra funding to such bodies as the CPS for the efficiency programmes to work effectively. Furthermore, the measures adopted must not vitiate a viable legal profession. The EWCJS is not a single unified system but a group of separate organisations that often have different and even competing aims. He reminds us that, “All [his endorsed methods] are designed to streamline the way in which the business of the criminal courts is conducted without losing sight of the interests of justice” (Leveson 2015, p.2).

However, the Leveson report, it could be argued, is disappointing. It concentrates upon the procedures of the courts with the basic idea that improved procedures mean a more efficient system. As such it minimises the vital consideration that the efficiency of the system is a function of the efficiency of the agencies that use that system. It admittedly recognises the need for future CPS funding, but it ignores the fundamental and endemic organisational and staffing problems that currently bedevil the CPS.

With its preoccupation with processes, it also appears to accept the idea of assembly line justice and tends to ignore the dangers to the system of proposed efficiency measures and their possible perverse consequences. It is built upon the vain hopes that after measures have been inaugurated that nothing will change in respect of the rule of law and the maintenance of justice.

The NAO report on ‘Efficiency in the Criminal Justice System’ arises from Leveson’s work and follows its guidelines. This factor, together with the fact that the NAO are the custodians of the national purse, has led to the production of an understandably constrained report. Nevertheless, although it concentrates upon the attaining of savings and reducing delay in the EWCJS, it did discuss the effects of delay upon witnesses and

victims. The reports found wide regional variations in delays and 'cracked trials' (that is intended trials that do not go ahead to trial despite an original not guilty plea) throughout England. It believes that a fundamental cause of inefficiency is the fact that there is a silo mentality; that all agencies are under pressure to reduce costs and work, even if it “causes problems for others. Costs are therefore shunted from one part of the system to another, rather than being removed from the system altogether” (NAO 2016, p.27). Thus, for example, the police do not do a forensic report in order to save costs, although this causes problems elsewhere when it comes to trial.

The report bemoaned the lack of incentive for CJS agencies to work together for a common purpose and endorsed the propagation of 'best practice' within agencies. Like Leveson, the report seems to believe that the silo mentality can be overcome by coordination and changed culture in the various agencies.

The report referred to the four major initiatives to reduce delay in the CJS, namely, *Transforming Summary Justice*, *Best Case Management*, the *Common Platform* computer system, and the IT centred *Court Reform Programme*. These programmes have only recently commenced, but the report did not reflect the faith that the MOJ has in the IT programme noting that such projects are difficult to deliver well and that the government does not have a good record in this respect. The adoption of the IT programme has become a mantra of salvation in the MOJ publications and in the evidence given to the House of Commons (PAC 2016b). However, the report states, “better IT infrastructure and a modernised estate would provide the tools for a more efficient, less paper-based system, but are not sufficient to address all the causes of inefficiency in the system” (NAO 2016, p.7).

There is an implicit assumption in the report that reduced budgets make it more difficult for agencies to carry out their functions. That highlights a further concept and distinction in efficiency. Productivity per person may have increased in all agencies of the CJS, however, the reduction in manpower may have become so great that an organisation, as a whole cannot, fulfil its functions in a timely manner. As such it unleashes internal conflicts that in turn undermine any efficiency gains, if any were made to begin with. Efficiency can be improved in such circumstances by increasing resources and/or by technological input. The government have chosen the technical input road by adopting the IT programme, thereby hoping for a Schumpeter effect. A fundamental drawback of the NAO report is the lack of reference to possible drawbacks and perverse consequences of the envisaged programmes of efficiencies. Speeding up the justice process, making it cheaper, and reducing delays may have some ramifications for justice and fair process.

4.7 SUMMARY AND CONCLUSION

Some US solutions of inefficiency do in part demand more resources for their implementation, and this policy, in this time of austerity, is not an option for the EWCJS. Plea bargaining, as understood in the US system where prosecutors can put down definitive penalties as bargaining chips, is not established in the EWCJS. However, the EWCJS now has many facets in common with their common law cousin in the US. There are heavy discounts for an early plea, as embodied in the EGP scheme, with steep drops in the discounts thereafter. These measures, together with increased pressure to plead guilty, coupled with Goodyear indications when the judge can signal to the defendant what the maximum sentence will be, may cumulatively lead to earlier guilty pleas and

fewer trials in the Crown Court and, thereby, speed up the business of the courts (Cohen-Lask 2016).

The efficiency drive is partly a result of austerity, and the drive is conceived in terms of productive and technical efficiency. Success of the programme is evidenced by reducing delay and cutting costs. The UK government have adopted the same language as Pound, and view the EWCJS as 'archaic,' and consider that delay is the prime indicator of inefficiency. (MOJ 2014c; Leveson 2015). Akin to the US, in UK government thinking there is the idea that delay in the court process is partly due to defence tactics which, in part, explains some of the legal aid changes including the introduction of fixed fees. Most of the references to this efficiency drive have, by necessity, rested upon governmental rather than academic papers. The government have linked delay with injustice, and their efficiency programme is conducted in terms of eradicating delay and getting value for money. In addition, the achievement of efficiency is seen as a necessary condition for the attainment of other goals, such as the reduction in crime and reducing reoffending.

Unlike some of the US literature, there is no discussion in the main governmental or ministerial literature that confronts the possibility of a conflict between the drive for efficiency and the maintenance of other values, such as justice. The efficiency drive, however, is conducted within the terms of NPM, and that theoretical underpinning provides a commitment to markets and allocative efficiency. The remodelling of the probation service is a prime example of doctrinal commitment to market efficiency. However, the mechanisms adopted to attain allocative efficiency, namely a modified market / price system and devolving decisions to the 'frontline' officials, may prove to be inefficient models of resource distribution. Any failure by frontline officials to distribute

allocative efficiency may likely lead to the further result of centralising decision making which, in itself, shows the tensions that can occur when attempting to practically attain the different goals demanded by the NPM edifice. There is an implicit faith that the dynamic efficiency of the IT programme will bear great fruit, despite the past histories of such government led programmes. The court 'crisis' is centred upon the bitter disputes concerning the provision of legal aid, and dire warnings as to the future of the rule of law have issued forth from both camps. Both the government and the legal professions have given an undertaking that a viable and energetic legal profession must be guaranteed.

The report of Lord Leveson provides a guideline for a court efficiency programme which has, in main part, been accepted by the government. The NAO report in turn gives a better informed although partial snapshot of the current progress and failings of the programmes adopted by the government. Despite Leveson's reminders in his report that the measures adopted must be in the interests of justice, the possible pitfalls of injustice are not addressed and the report is, therefore, limited in being a comprehensive dossier on how to achieve technical / productive efficiency in the courts as manifested by the criterion of reducing delay.

CHAPTER 5

METHODOLOGY

5.1 INTRODUCTION

The methodology is geared to answer the research questions, namely:

- (i) What are the concepts of efficiency adopted, explicitly and implicitly, by post 2010 governments in the efficiency drive in the English and Welsh courts and the EWCJS?
- (ii) In the light of those concepts, what are the efficiency measures adopted by those governments?
- (iii) What is the theoretical [and practical] contribution made to the efficiency drives by NPM?
- (iv) How effective and successful are the efficiency measures so adopted?

The philosophical stance is that of critical realism. Initially there is an establishment of efficiency concepts which will be used in subsequent analysis. By the examination of governmental documentation and sources, the concepts of the government's efficiency programme are established. The empirical project within the critical realist nexus is primarily that of a sampling structure with subsequent interviews of experienced lawyers. The findings of those interviews are compared and integrated with the findings from other sources and, together, these tools are used to finally decide the answer as to the effectiveness and success of the government efficiency measures adopted.

5.2 PHILOSOPHY OF THE ENDEAVOUR

Critical realism subscribes to the view that there is a world that ontologically exists despite having to be described by discourse and mediated by theory. Discourse which is

theory laden does not mean that it is purely theory determined. There is no contradiction in asserting that states of affairs can be reported, that truth values can be attributed, and that causal factors can be isolated, discerned, and articulated.

Thus this thesis can meaningfully argue that that the interpretation by lawyers of what is happening in the courts is correct, incorrect, or partially correct. What they say has factual resonance, their uttering are not confined to their experiences conceived as contained within a realm of subjective idealism. The thesis also rejects positivism in the social sciences with its naive attempts to reduce the social sciences to the methodologies and ontology of the natural sciences. Furthermore, the postmodern reduction of social science to merely the interpretation of meaning is also rejected. Reliable knowledge can be gleaned despite the absence of certainty and regularity. One cannot reduce social life wholly to the level of meaning, ignoring material change and what happens to people (Sayer 2000).

In line with critical realist thought, the thesis endorses the idea that while interpretive understanding is an important and necessary feature of any social science, it does not thereby exclude causal explanation (Sayer 2000). Qualitative studies can provide causal explanations. Social science has been hamstrung by a positivist and quantification idea of causality as based on regularity and the striving for the establishment of general laws as exemplified by the deductive nomological approach (Hempel 1965). The regularity conception of causation has restricted and constrained our view of causation to observed regularities and, thereby, ignored contextual influences (Maxwell 2004; Miles & Huberman 1994). Historical studies provide both example and justification of the establishment of causes, without recourse to quantification and general laws. Let us take

as an example the Battle of Bosworth Field where, *ceteris paribus*, the experienced battle commander Richard the Third should have won the battle. He lost, and the obvious question is to ask 'Why?' One is not asking for a guess, a hunch, or a shot in the dark. One is asking for the reasons why he lost the battle. What caused this experienced commander to lose a battle which he should have won? One is asking for explanation, for causes. The well informed historical answers give an integrated and articulated account involving several factors that were in play at the time on that fateful day; they give the causes, or very likely causes, as to why that day turned out as it did. Such accounts will eliminate alternative explanations that, although plausible, are not cogent. It would seem that betrayal played a large part in Richard's downfall. Such a causal account is what may be termed:

Local causality—the actual events and processes that led to specific outcomes... Much recent research supports a claim that we wish to make here: that field research is far better than solely quantified approaches at developing explanations of what we call local causality—the actual events and processes that led to specific outcomes. (Miles & Huberman 1984:132)

Thus, the explanations of the social scientist should not be equated with those of the deductive nominological method of Hempel, of putting regularities into a propositional structure whereby the 'regularity' explains what has occurred because the event to be explained fits into a schema of past regularities. Such 'explanations' are, in fact, often devoid of explanation. Take, for example, Bertrand Russell's induction example of whether the sun will rise tomorrow. Such inductions were supposed to gain greater credence according to the inductive calculus by the number of additional times the sun

rose in the morning, but simply referring to the fact that the sun rises does not satisfy as an explanation of *why* it rises. If the relative positions, and mass of the celestial bodies of the earth and the sun, were to be positioned in a model that had the concept of gravity at its core, there would be a causal and scientific explanation. "Therefore realists typically understand causality consisting not of regularities but of real causal mechanisms and processes, which may or may not produce regularities" (Maxwell 2004, p.247).

The fact that the social sciences deal with 'open systems' explains why the social sciences often lack predictive ability, for it is often impossible to isolate the conditions required to ensure predictive success (Bhaskar 1979).

Positivists tend to applaud the use of quantification method and when possible trumpet its success of revealing causal connections through the establishment of regularities, either invariable or statistical.

However, regularities, by themselves, often lack explanation and the thesis endorses Tewksbury's contention is that the qualitative method is superior to quantification in providing scientific explanation and establishing cause.

In simple terms, qualitative methods are about gaining true understandings of the social aspects of how crime occurs and how the agents, structures and processes of responding to crime operate in culturally-grounded contexts.

Qualitative methods provide a depth of understanding of issues that is not possible through the use of quantitative, statistically-based investigations.

Qualitative methods are the approach that centralizes and places primary value on complete understandings, and how people (the social aspect of our discipline) understand, experience and operate within milieus that are

dynamic, and social in their foundation and structure. (Tewksbury 2009, p.30)

In respect of interviews, there is indirect observation of causal processes (Regan-Smith, Obenshain, Woodward, Richards, Zeitz, & Small, 1994) and accordingly the objectivist-constructivist divide is rejected and “interviews reveal evidence of the nature of the phenomenon under investigation” (Miller 2011, p.131).

5.3 SAMPLING STRATEGY

Purposive sampling represents a group of different non-probability sampling techniques. Also known as judgmental, selective or subjective sampling, purposive sampling relies on the judgement of the researcher when it comes to selecting the units (e.g., people, cases/organisations, events, pieces of data) that are to be studied. Accordingly,

With a purposive non-random sample the number of people interviewed is less important than the criteria used to select them. The characteristics of individuals are used as the basis of selection. (Wilmot 2005, p.3)

My sampling strategy was that of purposive sampling combined with quota sampling. This strategy so adopted was integral to my inductive approach. Thus “sampling of people to interview...is undertaken so that additional information can be obtained to help in generating conceptual categories” (Robson 2002, p.193).

The characteristics of individuals sought were fundamental to the enterprise. I wanted lawyers of a certain length of experience who would also give good and considered answers to the research questions. I chose lawyers I considered would, in my judgement, have the requisite experience, and who would give frank, considered, and honest answers. Not all lawyers fulfil these two main criteria. There was, therefore, a layer of

homogeneous sampling. Participants were selected based on their having similar characteristics because such characteristics are a particular requirement for the research project. The length of experience was the homogeneous element. Thus, as a minimum requirement, I wanted to interview lawyers who had experienced the changes and initiatives in the time of austerity, namely the period from 2010 to date. Thus this choice of lawyers meant professionals with at least five years qualification. This would include lawyers who, taking into account their pupillage or training contracts, would have started their careers in at least 2010.

In addition, some lawyers would need to be barristers, some HCA's, and some magistrate court advocates. Thus within the purposeful sampling there was also a quota system operating. I concluded, from my own experience, that HCAs would be the richest vein of experience to tap. They would have the dual experience of working in the Crown Court and also the magistrates', give a holistic view of the workings of the two systems and, importantly, their intermeshing. I decided that a large proportion of the participants had to be practicing HCAs.

Because of a possible difference in work profile, I decided that some lawyers should be from rural practices. Furthermore some lawyers should not be known to me before the interview. Although I could not be sure of the 'credentials' of the lawyers not known to me, their inclusion gave more balance to the sample and some element of randomness. I would also, as a validation exercise, be able to compare the data from the 'known' lawyers to those of the 'unknown.' It transpired that there was little or no variation between the views of the lawyers previously known to me and those I met for the first time in the interview.

	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Age	33	33	48	44	60	48	40	45	41	65	39	46	52	52
Female / Male	F	M	M	M	M	M	M	M	F	M	M	M	M	F
Experience	2.5	8	23	12	38	21	14	22	13	36	16	23	27	26
HCA			X			X	X		X	X			X	
Crown Court			X			X	X		X	X	X	X	X	
Magistrates Court	X	X	X	X	X	X	X	X	X	X			X	X
Practice Rural/City	R	R	C	C	C	C	C	C	C	C	C	C	R	R
Previously Known /Unknown	UK	UK	K	K	K	K	K	K	K	K	UK	UK	K	UK

Fig 3. Profile of Participants

The mean age of the participants at the time of interview was 43.3 years. The years of experience of the participants ranged from two and a half years to thirty eight years, with the mean experience at the time of interview being 20.1 years. Six of the totals were HCAs and two were barristers, which meant that eight of the total was experienced in the Crown Court. The sampling was purposeful and in the sampling plan it was intended that a large proportion of the participants would be HCAs, solicitors who had a wide experience of both the Crown and the magistrates' court. The remaining six participants were solicitors who conducted work solely in the magistrates' court. Eleven out of the fourteen were male and three were female. Ten participants came from urban chambers

or practices whilst four were from rural areas. With the exception of one participant, all were graduates with law degrees or joint degrees which included law as a major element. I continued interviewing until saturation was reached. That is, I kept on accumulating data until new interviewees were not adding significant new material (Robson, 2002). This required “a flexible research design and an iterative, cyclical approach to sampling, data collection, analysis and interpretation” (Marshall 1996, p.523).

5.4 INSIDER AND OUTSIDER REVISITED

From one point of view I could be deemed to be an insider. The endeavour can be termed insider research taking into account the wide definition of insider as provided by Robson, “an ‘insider’ is a researcher who conducts a study that is directly concerned with the setting in which they work” (Robson 2002, p.382). Thus, working in the ‘setting’ of a criminal law advocate I was an insider. However, I would be an outsider according to a rather narrower definition of insider as provided by Brannick and Coghlan (2007). For them, insider research is specifically conducted by “complete members of organizational systems and communities” in and on an organization.

I considered myself an outsider from the point of view that I was not part of the participants’ firm or organisation; and, also, I had mainly prosecuted, whereas they had mainly defended cases. However, I was an insider in that I was a criminal law advocate who spoke the same language as the participants, had undergone the same training, and had lived through many similar professional experiences.

Insider research has often been frowned upon as a method. The researcher is sometimes thought to be ‘too close’ to the setting to be objective, thus casting doubt upon the validity of its methods and the authenticity of the findings. “Insider research typically is

seen as problematic, and indeed, frequently is disqualified because it is perceived not to conform to standards of intellectual rigor because insider researchers have a personal stake and substantive emotional investment in the setting” (Brannick & Coghlan 2007, p.59).

It is claimed that this perceived lack of intellectual rigor is due, in part, to the role conflict that any insider will be confronted with in researching within their own organisation and amongst their own colleagues. Accordingly, “as a result of trying to sustain a full organizational membership role and the research perspective simultaneously, insider researchers are likely to encounter role conflict and find themselves caught between loyalty tugs, behavioural claims, and identification dilemmas” (Brannick & Coghlan 2007, p.70).

But, being an insider has certain advantages. Having an intimate knowledge of the context of the organization may prove to be invaluable to the study. An insider may therefore be aware of the two separate lives that an organization may have: the formal and informal (Teusner 2016). Accordingly, “insiders understand how the system really works, who to approach, and can have immediate ‘street credibility’ as someone who knows what the job entails and what pressures there are within the organization” (Robson 2002, p.382).

Accordingly, I considered that as a researcher I had the best of both worlds. I had no personal stake or substantive emotional investment in the setting. I was not subject to the constraints that arise with my job being on the line if the research did not follow the company philosophy or might prove to be embarrassing for the senior management. There was also no prospect of having to live through a possible ostracising by my

colleagues. I could be honest without having to worry about the interplay of the firm's office politics. As such, many issues of power nexus, of fear of offending a person higher in the hierarchy, and the danger of intimidating participants more junior than me in the organisation, did not arise.

My training and experience gave me the insights into how the participants worked, the matters that would daily confront them, the difficulties they had to manage, and the weight to be given to their testimony.

However, despite the advantages of my positions of part insider / outsider, I had to be aware of difficulties of my position. Empathy with fellow professionals could be easily misplaced. It became evident that researchers could develop a bond with those being interviewed, this being particularly so if they had shared experiences upon which a bond could develop (Teusner 2016). It may be thought that the mentioned difficulties are compounded when a researcher interviews people he or she knows. In my case, more than half the people interviewed were people I knew professionally. Interviewing people I know could easily be considered a grave weakness. There could well be a reticence on my part not to embarrass, not to probe too deeply for hurting or giving offence to people known to me.

In order to encourage positive engagement of the highest form there is a simple rule of thumb: the better the quality of the relationship between interviewer and interviewee, the richer the quality of the data elicited. This is because experience shows that when interviewees are comfortable and trusting, they relate richer stories and elaborated explanations. Respondent rapport is recognized as a particularly important element in both standardized and less structured interviewing (Ryan & Dundon 2008, p.444).

Thus a pre-existing relationship can also expedite the process of developing rapport. Accordingly, interviews can become rich in depth and breadth, because time has not been wasted in establishing a base on which the participant feels comfortable to open up to questions. (McAllister 2005)

But it's not just in the realm of rapport that interviewing known participants has value. Pre understanding "refers to such things as people's knowledge, insights, and experience before they engage in a research programme" (Gummesson 2000, p.57). Accordingly, "if the researcher knows the informant in question well, then the researcher's a priori knowledge on the informant's values, norms, characteristics, ...and ... experiences might enable the researcher better to understand and comprehend the informant's lines of interpretation" (Blichfeldt & Heldbjerg 2011, p.26).

There is a belief that to obtain good and objective knowledge, the participant must be kept at arm's length and be an unknown to the researcher; 'the 'hidden agenda' that may make us, uncritically, turn towards interviewees that we do not know in advance. (Blichfeldt and Heldbjerg 2011, p.30)

This positivist undercurrent has no real foundation. The interviewing of a stranger *per se* does not guarantee a method via which will lead to an unsullied attainment of the truth. There may be a natural reticence not to open up with a stranger, and not to give one's true thoughts and opinions. The participant may become unresponsive, the conversation stilted, and the data gained incomplete. It is ventured that there is a far greater chance of achieving more complete, thorough and honest data if good rapport is established: and the establishment of rapport will be much easier to obtain by dealing with persons who are known.

Many of the obvious pitfalls did not apply to my endeavour. There was nothing for the participants to gain in the endeavour, either materially or by favour. There was no chance of being treated more favourably, such as may be the case in a doctor patient relationship. Furthermore, there was no realistic possibility that the interviews would be conceived as possessing a role in therapy.

One great bulwark against the possible problems of interviewing persons known to me was the past professional relationship I had with the participants. This enabled the attainment of rapport, but also provided the arm's length professional distance required by a researcher attempting to attain objectivity.

Nevertheless, even with such scrutiny of the majority of potential participants, the researcher was also aware of the concept of 'transaction' and that participants potentially have their own agendas and goals (Bourne-Day 2008, p.36).

Such agenda and goal for taking part in the research, maybe, "for example he may see the researcher as a gateway to knowledge, access, or privilege" (Webster, Lewis, & Brown, 1999.p. 85).

The granting of knowledge, access, or privilege by me to the participant was not within my remit or capacity to bestow. It was also very doubtful that the participants could think that such bounties were within my compass to grant.

Lawyers, like every other profession and economic activity, have vested interests. It is therefore possible that, on a more subtle level, the interview process could become a platform via which to complain, to pursue and express vendettas against a government perceived to be unsympathetic to the plight of the legal professions. Professionals may consider that they are above such pettiness and they are conducting themselves in the

best interests of all those involved. Lord Neuberger has eloquently highlighted such prejudices observing that,

virtually every human being finds it very hard not to believe that any measure which is contrary to his or her interests is contrary to the interests of society generally. I readily accept that this is also true of the judiciary: contrary to what some of you may think, we are also human beings. This means that one should be very careful to check before invoking the public interest against a proposal which is contrary to one's own interests. (Neuberger 2013, p.16; Appendix E)

It was therefore necessary to enhance validity by a comprehensive programme of reflectivity and reflexivity. The process of reflection is usually depicted as a cycle. The subject cum observer ruminates upon experience, good or bad, and thereby evaluates the situation. From that evaluation the subject produces a plan which is then implemented in order to improve the subject's performance. The oft referred to account of reflection (Kolb 1984) was the basis of my reflection process. The cycle is incessant and the aim will be for consistent improvement. The practitioner will always be asking ' Why are we doing it this way?' 'Is there a better way?' (Christi 2007, p.485). Despite this basic amazing simplicity, there is now a plethora of supplementary, complex, and, to some extent, fiercely competing models of reflection. The literature on reflection spans a whole range of professions with, understandably, a concentration upon the 'caring' professions of nursing and teaching.

Basically, reflection is 'outward looking' in that in that the practice:

is an in-depth consideration of events or situations outside of oneself: solitarily, or with critical support. The reflector attempts to work out what happened, what they thought or felt about it, why, who was involved and when, and what these others might have experienced and thought and felt about it. It is looking at whole scenarios from as many angles as possible: people, relationships, situation, place, timing, chronology, causality, connections, and so on, to make situations and people more comprehensible. (Bolton & Delderfield 2018, p.13)

In contrast, reflexivity is a process of self-examination. "Reflexivity, broadly defined, means a turning back on oneself, a process of self-reference. In the context of social research, reflexivity at its most immediately obvious level refers to the ways in which the products of research are affected by the personal and process of doing research" (Davis 1999, p.4).

Reflexivity is the hall mark of excellent qualitative research and it entails the ability and willingness of researchers to acknowledge and take account of the many ways they themselves influence research findings and thus what comes to be accepted as knowledge. (Teusner 2016, p.222)

The omnipresent effect of reflexivity and reflection played the same role as the slave, who whispered in the ear of returning glorious generals to Rome. '*Memento mori*' the slave would constantly whisper: 'remember you will die.' Thus my methodological conscience made the same whispering. Remember to reflect. Remember reflexivity. Where is the bias, examine your motives, what is your basis for the conclusions drawn? Remember truth, remember validity.

Thus, after each interview I would engage in a process of reflection and reflexivity. I would question the answers presented, the apparent truthfulness of the answers, trying to discern any hidden agendas of the participants. I would question my own reaction to various answers, probing for bias and slanted interpretation. The process was time consuming, but also essential as a watch on validity.

An essential element of the validation process was to check the findings against other sources, a data triangulation exercise. Newspaper articles, government publications and websites, academic journals, and the NAO and PAC were important cross referencing sources. The research work of the NAO and PAC, in particular, gave not only food for thought but also strongly supported the research findings.

5.5 QUALITATIVE RESEARCH

To genuinely ask, 'What is the qualitative research method?' is not to ask a rhetorical or otiose question with the expectation of a simple and bland answer. Robson, in his elucidation of qualitative methodology, refers to the work of Tesch, who listed forty six labels used by qualitative researchers to describe their approach (Robson 2002; Tesch 1990).

There are, indeed, a multitude of methods and sub methods under the qualitative approach umbrella, ranging from ethnography to rigidly controlled structural interviews. However, what does become clear from a perusal of the literature is that different methods and approaches to qualitative research do tend to adopt differing ontological claims and assumptions. Furthermore, the literature does guide the prospective researcher to adopt a method which is 'suitable' for the ontological and epistemological beliefs of the researcher. Rather like the sorting hat in Hogwarts that allocates students to

their respective Houses, some literature tends to the same function. 'Ah, Realist, then quantification for you. Post-modernist eh, then have a good time in Ethnography!' The implicit major, and incorrect assumption in respect of quantification methods as a genre, is that such a method is the core and, for some, the sole methodology of causal discourse.

Qualitative research does not in general involve dealing with numbers but is based more on information expressed in words – descriptions, accounts, opinions, feelings, etc.

Admittedly, this approach is common whenever people are the focus of the study, particularly small groups or individuals, but can also concentrate on more general beliefs or customs. Frequently, at the outset of the research endeavour, it is not possible to determine precisely what data should be collected as the situation or process is not sufficiently understood. Adjustments to what is examined further, what questions are asked and what actions are carried out is based on what has already been seen, answered and done. This emphasis on reiteration and interpretation is the hallmark of qualitative research.

There is no philosophical problem in being a critical realist and adopting a qualitative methodology. This study is qualitative and required in depth interviews to understand the court room experiences of the participants. Findings in respect of working in such units can be studied “prospectively using a series of interviews” (Robson 2002, p.271). Causal relationships and explanations can often only arise from those with an intimate knowledge of the internal workings of such a system, and a system of quantification without such qualitative insight could only scratch the surface limited as it would be to constant conjunctions in the search for causal relationships (Hume 1955). Thus, the

author endorses the supremacy of the qualitative approach in both explanation and cause in that,

The numerous advantages of qualitative methods provide a depth of understanding of crime, criminals and justice system operations and processing that far exceeds that offered by detached, statistical analyses... the knowledge gained through qualitative investigations is more informative, richer and offers enhanced understandings compared to that which can be obtained via quantitative research. (Tewksbury 2009, p.38)

The basic method was to ask the participant professional users of the courts their views on what is happening in the courts. The interviews were semi structured, to provide as much scope as possible for the participants to expand upon their answers and, by so doing, provide material which would reflect their wide and deep experience and to provide concrete examples. Interviews, by providing rich data, give a full and revealing picture of what is going on and the processes involved (Becker 1966).

According to some versions of inductive theory the theoretical ideas should develop purely out of the data collected, the theory being developed and refined as data collection proceeds (Glaser 1978). This is an ideal that is difficult to achieve because, without some theoretical standpoint, it is hard to know where to start and what data to collect. The collection of data was in accord proceeded with alternating cycles of data collection and data analysis (Glaser and Strauss 1967). To that extent, the intended approach was inductive with the generation of theory from data. That is to mean at least some element of theory is endemic in the very act of data collection (Popper 1972). In this respect, the method was akin to the Strauss conception of theory generation rather

than the Glaser interpretation, in that the researcher can initiate the research enquiry with a predetermined research question in mind and is committed to the concurrent gathering and analysis of data (Howard-Payne 2016). The defence of pure induction is now uncommon among grounded theorists (Orton 1997). Accordingly, sophisticated grounded theory and induction in general has become compatible with the critical realist stance when it “is recognized that observations are necessarily theory-laden and influenced by ‘pre-concepts’ – or ‘proto-theories’ in critical realist terms” (Belfrage & Hauf 2017, p.259). Accordingly, a researcher's belief about epistemology and reality will by necessity determine how they will analyse the data (Bryman 2012).

As the task is seen to be heuristic at the outset, the approach, without too much philosophical violence, could be termed inductive in that the research question is broad and the final research question and theme may be suggested empirically from the data. The method adopted may be more properly termed as mixed, that is, in the sense of being a mixture of both inductive and deductive approaches. Thus, the research question and themes have set a framework for the research, but the task is also inductive in that the researcher does not know where the research will ultimately lead. The participants suggested new themes and questions in their answers not anticipated by the researcher. After some initial interviews, there was a need to provide more prompts in the interview process, a function of the heuristic nature of the endeavour.

For the avoidance of doubt, induction in the sense used by the researcher is a method of suggesting themes or even theories. It is not a process by which hypotheses or theories can be 'verified' as in the positivist induction tradition of Bertrand Russell (Russell 1959) or Ayer (1990).

The researcher has been consistent in holding to a critical realist approach throughout his research. The researcher and the participants used the same "language game" (Wittgenstein 1958) as that employed by the MOJ. In many ways the participants can be regarded as expert witnesses. We can assign truth values to this particular language game, for "we call something a proposition when *in our language* we apply the calculus of truth functions to it" (Wittgenstein 1958, section 136). Thus, an advocate, from his years of training and assessments, knows when he is confronted with an instance of 'injustice' or inefficiency in the day to day workings of the court system.

The participants conducted their answers in the causal terms laid down the MOJ, and their explanations were in accord with what may be termed critical realism. In summary, the proposed research is understandable and can be meaningfully discoursed between all the participants because they all share the same community of a particular internally consistent language game. Whether that language game itself is valid is a wider philosophical issue.

5.6 SEMI STRUCTURED INTERVIEWS

Face to face interviews offer the possibility of modifying one's line of enquiry, following up interesting responses and investigating underlying motives in a way that postal and other self-administered questionnaires cannot...The interview has the potential of providing rich and highly illuminating material. (Robson 2002, p.272)

The flexibility of the interview referred to by Robson *supra*, was essential for the task. Each participant had experience of the courts, sometimes running into the decades, and

the semi structured interview was the best method by which such depth of experience could be brought to the fore and adequately articulated and recorded. The participants were able to discuss something in detail and depth and, furthermore, meanings behind an action or fact could be revealed as the participant was encouraged to speak for themselves with little direction from the interviewer. However, this depended upon establishing a positive rapport between the participant and the researcher. I was fortunate in knowing several of the participants both professionally and as friends before the commencement of the interviews. Swapping stories about what had happened since we last met helped to put everyone at ease, so that the first question slid into the nexus without violence. For the participants I did not know, the fact that they were fellow lawyers reduced the difficulty in establishing a rapport between us. I found that complex questions and issues could be discussed and clarified and it was second nature to probe areas suggested by the participant's answers, picking-up information that had either not occurred to me or, on occasion, the imparting of information about which I had no prior knowledge.

This is not to say that the method did not have its drawbacks. Travelling to interviews meant hours of car travel, listening to participants, and then the labour of the transcription which involved up to 10 hours of work for each hour of interview.

Listening to a recording, I was to learn is indeed a skill of its own. It is not passive but quite active. Due to the face to face and immediate character of the medium, as an interviewer, I had to pay constant attention to the interview and formulate questions as a result of new avenues of experienced opening up before me. I experienced "double attention", which means

that you must be both listening to the informant's responses to understand what he or she is trying to get at and, at the same time, you must be bearing in mind your needs to ensure that all your questions are liable to get answered within the fixed time at the level of depth and detail that you need. (Wengraf 2001, p.194)

The interviews were recorded with the permission of the participant, and recording has the great advantage that the interview report is more accurate than writing out notes. However, I did take some short notes in the interview, at points at where any particular participant stimulated my thoughts on various topics. This acted as a prompt to me that the topics were being covered by the participant, and also as a comfort blanket, a kind of back up because I was worried that the recorder for some reason would malfunction.

The research interview lasted approximately one hour duration for each participant. The interviews were conducted in the offices or chambers of the participants for their convenience and the supposition that they would be more comfortable in familiar surroundings. A core of 'specific concerns' was incorporated into the questions because their presence or absence within a working court unit should be clearly apparent to a working participant in a court. The interview was semi structured, in that although there were some basic questions put to the participants they had scope to range over topics and areas that they considered important. The framework of the questions centred upon the changes to the court processes over the last few years together with prompts (Appendix F).

The researcher was also aware of the possible presence of personal traits which could have a deleterious effect on interview interaction.

It is also important to recognize that while any person can do quantitative research on any topic, the personal statuses and traits of qualitative researchers can provide powerful barriers to successful completion of projects. Because interaction is required when collecting qualitative data, some researchers may have demographic, social or political traits that are defined as undesirable, deviant or otherwise overly negative and as a result those one desires to study may refuse to interact with the researcher. (Tewksbury 2009, p.48)

However, the researcher, by periods of reflection after each interview, examined the interview transaction and attempted to make awareness of such barriers, and the possible bias and uncritical acceptance of the views and perceptions of the participants.

The first question of the original interview schedule; 'What changes have you observed in the courts over the past few years?' needs some clarification. I found that this question, although extremely open, was an effective entry to the main topic of the work of the courts and raised issues that could be effectively mined. As a general question, through its openness and implicit ambiguity, it actually covered many potential points, raised interesting by-lines and often allowed the participant scope to roam and touch on many related topics without prompts. Any relevant answer to the question could encompass, for example, the volume of work in the courts, changes in court procedures, the speeding up of court processes, or the new non-adjourment culture adopted by the courts.

In their replies, most of the participants often answered, at least in part, questions 4, 5, 6, 7 and 8 of the original schedule without those actual questions being asked and with no further prompts or questions.

In the original proposal of the thesis, it was said that there may prove to be amendments to the interview schedule because of the heuristic nature of the enquiry. It quickly became apparent that the questions had to be modified, in order to provide fuller determination on the efficiency of the courts. The efficiency of the courts not only depend upon how the courts internally organised themselves and upon the way they processed business, it also depended upon the efficiency of the organisations that put through the business of the courts, such as the CPS, the police, and the probation service. The courts may have streamlined themselves to increase the throughput of business, but the organisations that put the work through the courts may not have been so updated. As an example, building a new six lane highway with good surfaces to replace the old worn road of yester year seems like progress, however it avails nothing if the people using the road still retain their hay cart pulled by worn out donkeys. Because of the above considerations, it became germane to ask subsidiary questions in two main categories. Additional prompts and questions were added regarding court structure, on such topics as EGP, retaining cases in the magistrates courts, the 'seamless court', and the use of technology.

Other questions and prompts were added, to include the organisations that use the courts such as the CPS and probation. In adopting this flexibility in the question schedule, I was in accord of not preconceiving the direction the interview will take. Such a strategy is particularly useful during early interviews but may change as the researcher moves back and forth between data collection and analysis (Charmaz 2011).

5.7 ETHICAL CLEARANCE

“Fieldwork is a delicate balance between the interesting, the workable, and the acceptable” (Ryen 2011, p.429). The comment neatly sums up the researcher’s basic problem, and getting the balance right is not always easy or straightforward.

I obtained ethical clearance for the thesis before I moved to Keele University, whilst a student at Portsmouth University. In attempting to obtain ethical clearance for my project, I found the hurdles placed by the University ethics committee were high.

However, the university via their web site provided good, clear guides, on how to apply for ethical clearance for a piece of research.

Furthermore, part of the course at that University was committed to the importance of ethics in research, together with the procedures to be followed and the technique to be employed in the application to the ethics committee.

That University also provided a self-assessment form which covered a wide range of ethical concerns. Questions were asked of the researcher regarding risks to the participants and the researcher, anonymity, deception, informed consent, likely harm to participants, voluntariness, and role conflict. The University also provided templates and examples of letters to send to participants and institutional gatekeepers of the participants. An essential element of the clearance procedure was to have read the *British Society of Criminology* ethical guidelines. A bundle of documents had to be compiled, including an ethical summary and the intended correspondence to gatekeepers and participants.

Part of the course involved what is known as the ‘Small Study.’ This is a piece of original research which eventually produces a ‘mini thesis’ and is completed before embarking

upon the main thesis. To commence the research upon the Small Study also required a clearance from the ethics committee. The procedure for ethical clearance was followed and clearance duly given. The interviews were conducted and a successful 'mini thesis' produced.

I followed the same procedure in the application for the main thesis, with the added precaution of seeking advice from the Institute ethics advisor. She replied with good and basic advice concerning the shortcomings in my application. Amendments to the application were duly made and the application accordingly completed. However clearance was refused on the first application. I was initially left to reflect upon the observation that in research there is no "single trustworthy ethical formula" (Rosenblatt 1999, p.11).

My mistake had been to follow the procedure, as laid down, and consider the completion of that process as sufficient to satisfy the ethical committee. As such it had become a tick box enterprise, a mere hurdle to be overcome before getting on with the real meat of the research. But the effort to fulfil the formal requirements of the procedure is not enough to satisfy the underlying ethical precepts which are the very foundation for the procedures as laid down. The committee was quite right to show flexibility and to enquire further, despite the fact that they had previously allowed a similar research project. Before replying to the committee, I decided to step back and reflect upon the situation. I had previously considered my research to be straightforward and unproblematic. In response to the rejection, I read several articles on ethics and research and came to appreciate that research can encroach on people's lives and integrity. Furthermore,

adhering to ethical norms may actually further the aims of the research, such as knowledge and truth (Resnik 2015).

Other writers go further and see a conceptual and practical intertwine between the research impetus and the moral imperative, for the capabilities that make good qualitative researchers good are at once ethical and epistemic. They argue that it is often futile to separate the epistemological and ethics when it comes to qualitative research (Brinkmann & Kvale 2005). According to Brinkman and Kvale, the key virtue of qualitative researchers is objectivity, which they maintain is at once a moral and a scientific virtue.

Harm was a central concept throughout the guidance articles. The concept of harm was linked to issues of power. The 2015 ethical guidance of the British Society of Criminology states that researchers should “recognise that they have a responsibility to minimise personal harm to research participants by ensuring that the potential physical, psychological, discomfort or stress to individuals participating in research is minimised by participation in the research.” The relationship between rights and duties has been explained in terms of powers and vulnerabilities. It has been argued, perhaps a little naively, that rights are derived from vulnerabilities, for we can only have rights because of our vulnerabilities (Harré 2005). By further reading I came to realise that all participants, even those who appear invulnerable, may have latent or potential vulnerabilities.

From either the deontological point of view, or the utilitarian, there was basic agreement on the central themes of ethical research. Causing harm to others, without moral extenuation, is wrong. The key throughout was how others should be treated. For example, I was reminded of Kant’s maxims of always treating a person as a person, as a sentient being, and therefore deserving of respect. “So act that you treat humanity,

whether in your own person or in the person of any other, always at the same time as an end, never merely as a means” (Kant 1996, p.429).

As a result of these thought provoking readings, I examined, thoroughly and carefully, my motives. I had to consider, *inter alia*, the persons I was to interview; and the potential damage to them, both directly and indirectly, financial and emotional, of the interview and its eventual publication. The concept of trust loomed large. If persons had entrusted me with information it was morally right should not be misused and their trust not abused.

I came to the conclusion that my study was, from an ethical point of view, not complicated. It was concerned with the efficiency of the criminal courts in a time of financial austerity. It did involve face to face interviews with experienced lawyers, but it seemed a very benign study with little or no attendant ethical risk. Ethical risks in research have been put into several main categories by writers, perhaps with possible harm to the researcher and/ or the participant being foremost. Such harm includes the psychological and the physical. Deep interviews can be emotionally intense and cause harm to the participant. It is also the case that over time the researcher, exposed to several such interviews, can suffer burnout (Allmark, Boote, Chambers, Clarke, McDonnell, Thompson, & Tod, 2009). Special care must be taken in respect of what are called vulnerable groups where exploitation, perhaps inadvertent, of the participants is a real risk where the enthusiasm of the researcher overcomes sound ethical judgement. Also of fundamental importance are the issues of confidentiality and privacy. These are essential trust issues. The participant is disclosing information which may be sensitive on the condition that it is not broadcast to all and sundry, thereby causing possible trauma,

embarrassment, or even financial loss. Great care must be taken for, although the researcher may have hidden the identity of the participant from the view of the general public, the participant may possibly be identified by his or her peers from the disclosure of seemingly 'innocuous' information (Allmark et al. 2009). Despite these evident pitfalls to qualitative interviewing, some commentators have tried to highlight the beneficial effect of interviews, such as acting as a kind of therapy for the participant who may have to revive painful memories (Rossetto 2014).

None of these real ethical concerns seemed to be a great risk to my envisaged work. There did not seem to be a high risk that the fundamental ethical principles which concern ethical committees would be severely breached. I was not searching for or exploring the psyche of participants in order to ascertain their deep emotional experiences. I was not, for example, engaged in bereavement research, lying bare what could be very traumatic events. Within the court setting there can be drama. There can be situations that are tragic, and some events are humorous or even hilarious. There is also much boredom but few, if any, real traumas experienced or undergone by the lawyer in the courtroom. In any event, lawyers have had to learn to detach their feeling from observed injustices, failures, and disappointments. Accordingly, there is an element of professional detachment from their work. Furthermore, in the interviews they were asked for their assessment on the workings of the criminal justice system, to give an 'objective' appraisal of how the criminal justice system is working. They imparted advice on how to do it better, but this did not involve revealing their inner soul or portraying a seismic event that changed their character or their lives.

Court room advocacy can be very tough, and those who cannot survive such an environment soon leave for other pastures. Accordingly, I was intending to interview a robust group of professionals who had 'seen it all' and heard it all, who had been exposed to the base side of human nature with its meanness, viciousness, and selfishness. However, the literature brought home to me that care had to be exercised when interviewing even these tough individuals in that "research has a potential to encroach on people's lives, autonomy and integrity' no matter who they are" (Kjellström, Ross, & Fridlund, 2010, p.430).

It transpired that the concerns of the committee were limited. Further elucidation was required and one member asked for a bibliography. The requirements of the committee were complied with and ethical clearance was granted on the 22nd July 2015 (Appendix G). The rejection of the initial application had put me in good stead. The rejection by the committee brought home to me the necessity to be ethically aware in even low risk situations, and the realisation that ethics had to govern the research process throughout. I came to agree with the observation that "research is an activity that, in itself, is fraught with ethical and moral decisions at every stage of the process" (Sherlock, & Thynne 2010, p.1).

5.8 GAINING ACCESS AND ETHICS

The researcher needed participants who had direct experience of the efficiency measures adopted by the MOJ and the agencies that used the courts. The researcher also decided that the most independent informed potential participants would be self-employed members of the legal profession who were prepared to speak their minds. They would have a frankness that comes with the freedom and independence that results from self-

employment. The sensitivity of the research stemmed from the fact that the findings could possibly be very critical of governmental and departmental policies and measures.

However, initially consideration had been given to also approaching judges, court officials, and the CPS in addition to lawyers and preliminary overtures were made in those directions (Appendix H).

The majority of lawyers that were approached were either partners of solicitor firms or members of the self-employed bar. If a solicitor was not a partner but employed by a firm, permission was sought from the partners of the employing firms. Initial contact was made by telephone, quickly followed by the introductory letter and the participant information sheet (Appendix I and Appendix J). Once permission was granted to approach individual lawyers, this was again conducted initially via telephone followed by e-mailed introductory letter and the participant information sheet.

The research study involved face to face contact with members of the legal community as the intended research methods involve qualitative research interviews. Hence, the collection of data was conducted in accord with the *British Society of Criminology Code for Ethics* and the *University Ethics Policy*, and the care of the data complies with the requirements of the *Data Protection Acts*.

All potential participants were fully informed as to the purpose of the study so that they could make an educated decision on whether they should participate. They were told what the study involved, why they have been asked to take part, and the voluntary nature was fully emphasised. There was a strong stress on anonymity, and a full explanation given as to what would happen to the data collected and the subsequent results and

findings. As an audio recording device was used the participant's permission was sought and a consent form completed (Appendix K).

The raw data will be used solely for the analytical purposes for which it was collected and kept for no longer than is necessary for the research and, in any case, no longer than 6 years from the end of the research. Recordings and electronic data is kept on the password protected hard drive of a desktop computer and data stored in paper files kept in a locked cabinet and will, after six years, be shredded and burned to ensure destruction.

The participants were not vulnerable in the sense of being educationally, culturally, or intellectually challenged in some way. They are quite unique in being highly educated, very articulate, and very aware.

The researcher had no duties towards the participants in the sense of being in a power or role relationship with them. Apart from the risk of a breach of confidentiality, there were no known or anticipated significant risks or burdens and the use of deception was not envisaged or called for in the study.

However, most participants, having weighed the possible reputational and other risks, were not concerned in respect of anonymity and indicated that they are not troubled about the allocation of certain views to them as individuals.

5.9 TRANSCRIPTION

Merely taking notes instead of making recordings would not have been sufficiently accurate or detailed for this qualitative project. The participants, when on very sure ground, spoke quickly and, when discussing a difficult point or concept, would mull the

matter over and change their mind or nuance until they arrived at a position they considered satisfactory and defensible. This would have necessitated a great deal of scribbling by the researcher, together with attention induced fatigue.

Despite using a good quality recorder, the recordings at some points were difficult to understand because of the recording quality (e.g. quiet volume, overlaps in speech, interfering noise) and the sometime differing accents or styles of speech. Luckily most of the difficult passages were interpretable through knowledge of their local and legal semantic context. There was great effort to transcribe what was said as verbatim, except that some idioms and idiosyncrasies of speech were excluded, such as when a participant, on pondering an answer, would say, 'Let me see,' for twenty plus times during the interview.

There was little difference between the participants in terms of education and class. The choice was the simple one of using the grammar and spelling conventions of standard UK written English which aided transcription and final readability.

I considered it good practice to transcribe each interview immediately after the interview had taken place. In that way, memory was fresh, as were the first impressions of the interview. Transcribing did have very good benefits in that it helped me think and reflect on the interview, its contents, the context of what was said, the nuances, the possible ambiguities, and how it could have been done better. In mulling and reflecting over the issues raised, it helped generate new and interesting observations. Thus transcription became part of the analytical process rather than a means to represent the data (Heath 2011).

Interpretation of what was said requires a proper reflection when the transcription process is taking place. As such, it is akin to being an art. Trying to interpret what is being said by a cockney child who is part of a Fagin type sub culture could call upon the highest skill and the full interpretive resources of any researcher. However, luckily, I was not in the position of a total 'outsider' looking in, trying to understand a culture or subculture of which I was not a part, and trying to discern the nuances of slang and 'in language' with which I was not familiar.

However, that very familiarity held its own inherent dangers. The danger throughout this study was that I knew too well what the participants were saying, with the possibility of bias and empathy clouding judgement and channelling the interpretation of what was said. As a partial counter to this possibility, the interviews were transcribed in full and were verbatim, thereby taking away the interpretation of deciding what was relevant and what was not and thereby ensuring some cultural 'neutrality.' Thus, I may be accused of taking the 'life blood' out of the interview, but, in the circumstances I believe that this is not the case. The accounts given by the participants were logically limited in scope, more often than not confined to the reporting of what the state of affairs was or was not. The language used was descriptive, and, where appropriate, provided causal explanations.

5.10 THEMATIC ANALYSIS

Thematic analysis is a method for identifying, analysing, and reporting patterns (themes) within data. It minimally organises and describes your data set in (rich) detail (Braun & Clarke 2006). However, it also often goes further than this, and interprets various aspects of the research topic (Boyatzis 1998).

A theme captures something important about the data in relation to the research question, and represents some level of *patterned* response or meaning within the data set.

Thus the methods involved “are essentially independent of theory and epistemology, and can be applied *across* a range of theoretical and epistemological approaches” (Braun & Clarke 2006, p.5) . Accordingly the method is ideally suited to the critical realist underpinning of this thesis. “Thematic analysis can be an essentialist or realist method, which reports experiences, meanings and the reality of participants” (Braun & Clarke 2006, p.9).

Another feature of its flexibility is that it can be used in both inductive and deductive methodologies (Frith & Gleeson 2004; Hayes 1997; Boyatzis 1998). In an inductive approach the collected data will be the building blocks for broader generalisations which will lead to the construction of theories. This tends to ensure the themes are effectively linked to the data (Patton 1990). Qualitative research requires understanding and collecting diverse aspects and data. Thematic Analysis gives an opportunity to understand the potential of any issue more widely (Marks & Yardley 2004).

In the recent past, thematic analysis has been considered a “poorly demarcated, rarely-acknowledged, yet widely-used qualitative analytic method” (Braun & Clarke 2006, p.2) . However, recent commentators have clarified the meaning, scope, and methods of Thematic Analysis. Recently, several commentaries have helped to pin down this method which has been much used, for example, in psychological and nursing research. The methods postulated for theme coding by seem to be variants of the four stages of coding contained in the seminal work by Bryman which was the basic method adopted by the researcher (Bryman 2012).

Codes identify features of the data that are important to the analyst and should be related to the research questions. Codes refer to interesting and salient features. Themes should then be sought which are unifying, higher order, concepts. A threefold classification of themes is workable (Attride-Stirling 2001). Basic themes are text segments direct from the data, and represent the obvious concepts that occur in the text. Organising themes serve to arrange basic themes into similar categories and phenomena. Global themes are the overarching abstracted representations of the data. They are the pinnacle nodal points as they group the organising themes together and display the interconnection between the codes in a theoretical thematic network. At this stage it was important to review the themes and refine them. Some themes turned out not to be themes and were discarded or amalgamated with others. This process led to the finalising of the thematic maps with final defining and naming of themes. The culmination was the production of the report, in which “extracts in thematic analysis are illustrative of the analytic points the researcher makes about the data, and should be used to illustrate/support an analysis that goes beyond their specific content, to make sense of the data, and tell the reader what it does or might mean” (Braun & Clarke 2006, p.25). With the transcription came ideas, the germination of themes which were a precursor to the actual formal commencement of coding. Initially following the guide by Grbich (1999), I familiarised myself with the data set and made initial comments and noted down ideas. As soon as I began to code, I realised I was making analytical choices, about which lines I was about to highlight. It was only at the time of the third interview that clear interview themes began to clearly emerge. As patterns emerged, I reviewed the themes again and tried to refine them. I was aware that the general move should be from the particular to the abstract, and that the process should hopefully generate an

increasingly refined conceptual description of the phenomena explored and an explanation of what is underlying and broader. After the first two interviews, I began to make notes, following the advice of one who eschews the use of computers at this stage of the analysis (Rapley 2011). I used Nvivo10 to collect and index the various coded sources, but the analysis and mapping out of concepts, connections, and the development of thought was done by diagrams on plain A4 paper. As the initial method to be adopted is heuristic then a 'zig zag' approach in the interplay of data gathering and more refined coding was used (Rivas 2011, p.369).

Constant comparison was the watchword of the approach leading to "...category formations which will suggest themes which contain an explanation or are part of a theory with new perspectives to the work" (Rivas 2011, p.374). In turn, concept maps checked whether the generated themes provided explanations of the data collected and classified. Indeed, concept maps were indispensable.

At the outset, I pondered about the amount, depth, and quality that the interviews would provide, heeding the imploration that having many cases increases accuracy and, therefore, enhances credibility. However, Glaser defends small samples for researchers when they believe that their data has saturated the properties of a theoretical sample (Glaser 1978). By the 14th participant I concluded that saturation had been reached and that the range, depth, and quality the study demanded had been achieved.

CHAPTER 6

FINDINGS

6.1 INTRODUCTION

Understandably, the more experienced lawyers could provide wider examples of support for their observations and opinions. However, a lawyer's length of service, specialism, or the level of court in which they predominately worked made no discernible difference between the opinion and attitudes of the various participants. Unanimity of information provided by the participants on most topics was a hallmark of the study.

6.2 FINDINGS

The major areas of concern voiced by the participants in the interviews were as follows.

6.2.1 A no adjournment culture. All the participants related that a no adjournment culture now pervaded the courts, even when an adjournment would have been the sensible course. There is an urgency to get matters concluded as soon as possible, as the following italic observations from participants relate,

and everything is incentivised for it [the case] to conclude on the first hearing.

JA

[court] clerks and magistrates are advised by the MOJ: 'we don't allow adjournments.' RF

The courts were taking a very active case management role, but in itself that was no bad thing.

The court clerks are taking a far more active role now in pursuing when matters are set down for trial. Case management, I don't think that is necessarily a bad thing, in trying to get matters clarified, what the issues are, ... they are desperately trying to have a trial on the issues rather than everything else. MA

However, there were complaints that the no adjournment culture was too inflexible and a crude tool with which to increase the pace of court work,

Adjournment is the most difficult application before a court ..., even when an application makes sense to all parties ..., nine out of ten times it is just refused. JA

There are occasions where adjournment is required but the courts have taken on this policy where nothing can be adjourned and a plea needs to be entered on the first occasion, and that is how they have pushed ahead unfortunately. MG

Even when the prosecution and the defence are in agreement, an adjournment is invariably refused,

the prosecution and defence are trying to argue reasons why we should be given time or adjourned.... [the court response is] 'no you can't have an adjournment.' JU

In contrast, an experienced Solicitor related the no adjournment culture to his own experience when he commenced his professional life in the early nineties. Then there

were adjournments after adjournments and the system became congested with cases. He relates,

Now they have done away with all of that. I, for my part, actually believe it is a good thing because there were so many unnecessary adjournments in the old days and it was clogging up the system. BC

The need for speed has, according to some participants, manifested itself in a tendency to bully defendants,

They're trying to ...bully is not quite the word, but they are being very aggressive with the defendants as well, remind them of their rights, remind them of their guilty pleas, remind them of the credit for guilty pleas, repeatedly reminding them even after they are represented. MA

The urge to speed up court processes and avoid unnecessary hearings also manifests itself by 'incentivising',

basically the way it is designed now is that they only ever want two hearings and the second hearing to be a trial, so when you come to the court for the first time, if it's a likely not guilty plea, there is a pre trial review form which you must complete and one of the questions is 'Has your client been advised of the credit for a guilty plea?', so already incentivising the fact their sentence will be less if they plead, and then the financial ramifications for a not guilty plea. JA

JA was relating his experience in a rural practice, but the phenomenon was also evident in a city magistrates court,

For a long time there has been a no adjournment culture in Coventry Magistrates' court which is not necessarily a bad thing for us, because as advocates on a fixed fee, I would like things dealt with sooner rather than later, so certainly that is encouraging for us, but, at the end of the day, if the client wants to make a decision to enter a not guilty plea and he denies the offence... sometimes it does almost border on bullying. MA

Bullying is a strong word, and especially telling when used by an experienced lawyer who is used to a robust court environment. The incentivising was not limited to the magistrates' court; one participant likened the new process in the Crown Court to plea bargaining,

But there is a lot more pressure on the Crown Court today to plea bargain, get issues sorted. We are getting more pressure from the Crown Court to [plea bargain] because trials do eventually crack, and they want them to crack at that stage rather than when they have set trials up and juries and that sort of thing. MA

6.2.2 Courts speedier / more efficient?

Although all the participants agreed that there was a no adjournment culture and the courts were trying to process cases more quickly, there was some dispute regarding how effective these measures were in making the courts swifter,

There is no doubt that the cases are swifter, they are listing matters for trial very quickly. KT

This same solicitor went on to report that the stand down reports now expected from probation had significantly speeded matters up,

when they list for guilty pleas in the morning the expectation is that any reports that are needed from probation for offences are done on the day, so whereas in the past I think they have been more likely to have been adjourned for several weeks for sentence. KT

The observation was backed up by the comments from two more solicitors of greater experience, who said,

If you are going to judge efficiency by the fact that there are fewer hearings the year, they are efficient. BC

I would. I would say they [courts] were swifter. HV

I don't think they [the courts] are on the whole [swifter] because, for example, they are being encouraged to sentence on the day the guilty plea is taken, which means now that probation have to have an input, so a case will be put back for a probation officer to see the defendant, that may entail a wait of an hour or two, for a report, generally oral to be presented. CC

This was an opinion formed on the business of a single day. Admittedly there was a wait for probation to do a report on that day. However, the fact that probation could produce a PSR so quickly meant that the case did not have to be put off for another three weeks.

Despite that caveat, two other participants believed that the courts had not improved in speed, despite the no adjournment culture,

I don't think they are more efficient, I think they waste a lot of time. MA

The following lawyer believed that the courts wasted a great deal of time by trying to convince defendants, especially the non-represented, to plead. A colleague was also of the view that trying to speed matters up had perverse consequences,

No, I would not say they are swifter. I think if anything it has been slowed down by the whole process. MG

Despite this difference in opinion, it is perhaps unlikely whether this particular slowing down effect could totally negate the overall speeding up process inaugurated by the no adjournment culture.

6.2.3 Concern over Transforming Summary Justice (TSJ)

Despite whether the courts were deemed swifter or not, all the participants voiced great concern regarding the consequences of the measures to speed up the business of the courts, as exemplified by the initiative *Transforming Summary Justice* (TSJ).

I think that TSJ, rushing things, can sometimes work, but I think that, more often than not we have to be careful that we are not losing out, skipping things that the court should be aware of. MA

The basic position was that, *cases are listed often too quickly. KC*

There was discerned to be a great deal of inflexibility in the no adjournment culture,

The more usual example is that you get what [disclosure] you are given on the day, you are expected to deal with it, as best you can because your client 'knows whether he is guilty or not,' that is the absurd proposition, and it isn't always the case that there is a full disclosure package there. CC

Thus even when the defence are disadvantaged by, say, inadequate CPS disclosure, such disadvantage is not considered sufficient for an adjournment. The no adjournment culture is rigidly imposed by the courts,

[the courts]are running on their own imposed agenda, and so they are just told they have got to get on with cases and that is not a good enough reason to adjourn the case off. CC

As a consequence the no adjournment culture tends to run counter to common sense,

[the courts are] pushed to just not adjourn things, they won't even if it's contrary to the interests of the client or the CPS, either way they're just like no, no adjournments, simply get it done. JU

Furthermore, in being too quick the courts can affect the quality of the case files presented to the courts by the police and the CPS,

The courts are certainly becoming speedier but sometimes I think it is a case of them becoming speedier just for the sake of it. I think there comes a point where it is far too quick. It is not just the courts' fault. I think the speed aspect of it has implications on how the police carry out their job, because a lot of the cases that come to court, the disclosure packages, the case itself, I don't think it's prepared properly or sufficiently enough for the matter to come before the magistrates court in the first place, bits of evidence are missing and so on and so forth. BC

They just push through from what I've seen anyway and it can be vital pieces of evidence that gets missed or isn't allowed to be investigated or an answer be given by the CPS and they just proceed to trial it. JU

Some of the results of swiftness were characterised as follows,

Well I think they are all into trying to encourage people to plead guilty, and to try and keep things out of the Crown Court, and trying to rush things along sometimes, and it affects both us and the CPS. MA

Over the past few years, there's been an increasing drive to, I think, conclude cases as quickly as possible. There is a fairly thinly veiled aim to improve statistics. Erm, and I'm not necessarily convinced that that always necessarily matches up with achieving results in justice. KC

Thus the pressures put on defendants to not only plead early, but to plead guilty, had consequences for justice.

6.2.4 Injustice for Prosecution

The participants believed that the schedules set by the courts rebounded to affect the prosecution, and one HAC testified to the pressure that was sometimes applied by the court to the CPS lawyer,

[The] difficulty is when you get to court, there is a lot of pressure on the lawyer to have a lower charge, or to agree something else to move things along. I sound like a prosecutor but sometimes the original charges are correct, they fit what the actual facts are, but there is pressure upon them to move things along, to hurry things, and they sometimes bow to that pressure, and they will reduce charges, change charges, in order to get that result. MA

The vast majority of participants stated that the CPS undercharged. Undercharging means that the offence is treated less seriously than it should be, the result being that the defendant is charged with a lesser offence,

The charging: I found there is a lot of under charging. There is almost an effort to try and undercharge cases to try and keep them in the magistrates' court, cost implications I think. Something that goes up to Crown Court will cost a lot more, whereas something that can be dealt with in the magistrates court is just easy, you know. But yes, that is one area where there has been a lot of undercharging. MG

I think there is no charging sometimes. People are being investigated by the police, they get diverted into cautioning, resolution thing thats going on, and there is a level of people who are charged, who are undercharged. CC

It was thought that the practice of undercharging stemmed from the CPS lack of resources,

The CPS undercharge because they haven't got the resources. GT

But I see a lot of cases where the offence charged should be more serious but it isn't. And I think that the lesser offence is charged to keep it within the magistrates court and it all comes back to saving money. BC

If this is the case then such a practice is not serving justice, because defendants are being charged inappropriately. Another HCA went on to comment that,

A District Judge, and I know his frustrations, and you would have seen it, when he was faced with prosecutors who had been presenting facts which bore no

resemblance to a common assault, or no resemblance to a theft, that was a robbery, that was a section 47, that was a section 20, and it was frustrating for him and he used to ask the prosecution who said 'Yes it has been reviewed,' and what else could he do? MA

A case retained in the magistrates' court will demand fewer lawyer hours and expend fewer resources than a case which is sent to the Crown Court. Undercharging reduces the seriousness of the case, and if a matter is reduced from a triable either way to a summary offence, it will stay in the magistrates' court. By the same token, what is a *prima facie* indictable offence may be reduced to a triable either way offence, thus ensuring that it is not automatically sent to the Crown Court. However, undercharging means that the offender may not receive the requisite sentence, and the victim may not get the justice they deserve.

The no adjournment culture, together with a lack of CPS resources, means that the CPS is often not prepared for their cases and trials. This solicitor explained that the system,

[And I think this system] is harming the prosecution rather than the defence because...to be honest with you I can't remember the last time I lost a trial. It's that bad, cases are either chucked out or the prosecution simply have not got their head round the issues in the case because the cases are reviewed so late in the day. I have heard a rumour that some trial files are only looked at by the prosecution the day before the hearing. That is when the material is served. BC the prosecution aren't properly or adequately prepared for the reasons we've explained, they're not proceeding with cases or are having to offer no evidence in cases where there is clearly a case and should proceed. KC

The general consensus was that the measures led to the *victim being disadvantaged* .RF

The lack of CPS resources was remarked upon by all participants, and CPS resource shortcomings were exacerbated by court attempts to speed up the advocacy process,

Because the speed with which these trials are now listed, and the number of them, and the lack of time the CPS have to process these things... there is a marked reduction in the quality of trial preparedness in my experience. HV

So, I don't think the CPS are coping [with the pace], because I don't think they have the staffing levels that they had; again down to money. CC

The understaffing was exacerbated by a lack of service from the police to the CPS,

You have got to remember as well that the prosecution can only have material to serve on the defence if they have got it in their possession. If they are not getting it from the police then there is absolutely no chance they are going to comply with directions made by the court. BC

Because of lack of preparation by the CPS, many fundamentals are not completed, and many otherwise viable prosecution cases are thrown out. There was genuine concern shown by the defence lawyers to the injustice for the victims,

Trials are collapsing, there is no justice for a victim basically and defendants don't face any kind of justice. MG

There was concern that the CPS were not prepared for trials,

there are some major prosecutors turn up and they haven't even had the file, they've had a digital something sent and then suddenly they're waiting for their paper pack to arrive and it isn't always there so they're running around

making phonecalls or checking in someone else's court to see if one of the main prosecutors have got their files. JU

The no adjournment culture, combined with a lack of CPS resources, leads to a situation where,

We get more [failed prosecutions] than we used to because disclosure hasn't been done properly, or witnesses haven't been warned properly. Something integral has been missed. RF

Unquestionably, there have been cases which have been dropped quite wrongly because of the lack of time and the lack of facilities, and presumably budget, that the CPS have got to prepare their case. HV

The same lawyer reflected that,

I have been amazed by some of the cases against clients of mine that have been dropped when it seems to me there is every prospect of a conviction and clearly in the public interest. HV

Even though the lack of CPS preparation was, in a narrow sense, good for defence clients, solicitors took a wider view than the purely parochial.

I am not going to complain because it benefits our clients at the end of the day, but for the system as a whole it is not a good thing. BC

The lack of CPS preparation meant that prosecution weaknesses could be exploited by the defence,

As a defence advocate you will try and rely on that, it sounds very cold but you rely on the fact that things aren't prepared in the way they could be prepared.

GT

There was a moral view expressed by most participants, a genuine ethical concern at what is happening to justice, as this HCA reflected,

And I think the magistrates ...see the injustice, we see the injustice, and I feel a little bit dirty sometimes because you know, I think 'that's not right.' It's good for the client to a certain extent in that he's got a lesser sentence, [but] perhaps that client should have had a bit of custody, perhaps that client should have involvement from the probation service to make sure he does not do that again. MA

I think the broad view is that society would expect that if somebody commits an offence that person should then as a starting point be dealt with through the courts. The fact that someone will find themselves being cautioned 3, 4, 5 times before anyone considers that there is a need to put that person in (court), I don't think that is a proper way offenders should be dealt with. They do see it as getting off with the offence. CC

The following very experienced solicitor made this telling observation,

If you mean by efficiency that it [the court] gets through its business quickly and with as little time as possible, it's doing much better. Very efficient. But if you are asking me 'whether it is dispensing justice as well as it used to?', then it isn't. And that's my definition of efficiency for the purposes of your question, and I would be surprised if you expected me to use any other definition. But

it's getting through its work quickly, and everyone's been told what to do and they do it, so we all finish at half past four and we all go home and all the rest of it, but I don't think that they deliver of justice at the level they used to. HV

All participants related the failings of the CPS, the lack of resources, and the majority commented upon the consequences for justice, the effect upon their clients, and the effects upon victims. There was no personal resentment about the people who man the CPS, indeed there was sympathy shown, as this comment makes clear,

The Crown Prosecution Service do themselves great credit. Those blokes, those girls I come accross seem to take their job very seriously, they complain all the time about the lack of time they have to prepare for things, and they complain about the way they are managed, but they remain as a body motivated to do a proper job and I am impressed by that. HV

Overall, there was a stark contrast between the empathy and understanding shown by the participants to the individual prosecutors and the antipathy towards the CPS organisation which was considered ramshackle and inefficient.

6.2.5 Police Injustice

Concern was expressed in respect of the quality of police files, and the consequences this had for justice. The police provide the CPS with the initial files and a lack of resources and expertise can mean that the quality of police, and ultimately prosecution files, is poor,

It comes down to the police. They don't have the money, the resources now because of the cuts to carry out these things prior to the matter coming before the court. BC

One reason noted was the lack of experienced police officers dealing with charging matters,

And furthermore... a lot of officers who have been there a long time, experienced officers, they were told 18 to 24 months ago they would have to leave when they had got their 30 years in.... I can cite a chap I represented at the police station, several months ago, he was arrested for a burglary and if the police had done their job properly and had been advised, I am sure the prosecution would have got a conviction but they just missed holes in the case. Failed to fill holes in the case identification and so forth. BC

Because the police lack resources to bring the files up to standard, the result is that the 'holes in a case' are not noticed and an otherwise viable case is lost. The deterioration in police officer's files was remarked upon by another experienced advocate who noticed that,

Increasingly the people who do these [police] reports aren't as literate as they ought to be. HV

The police are under a great deal of resource pressure, and they are therefore prone to divert cases away from the court,

My perception is that the police are under significant ... very substantial pressure to divert from the court HV

This pressure is due in part to a lack of resources,

they [the police] just have not got the resources... a lot of it is dealt with by way of community resolution. JA

The same solicitor went on to make the point that diversion can result in injustice to the victim,

But if I were beat up ...I don't think I would be happy with a community resolution.

There is a further implied reason for diversion, that not taking cases to court may be partly the result of police policy,

I think...over the past two or three years. I've noticed it over the past two or three years, and I know now that after having conversations with the police officers, the onus is upon actually now trying to keep cases out of the court. So resolutions in the police station, the focus is upon them, community resolutions, cautions, getting people together talking it over etc etc. BC

The reluctance to charge was also indicated by the number of cautions police gave to a single defendant, which previously would have brought forth charges after a first caution,

Now we are seeing people with two or three cautions before they go anywhere near a court. MA

The same lawyer gave an example of one of his clients being caught with a substantial amount of cocaine made up in dealer bags. The defendant had admitted the matter of possession with intent to supply. The police, however, merely cautioned the offender when the offence should have been charged with possession with intent to supply, pursuant to the Misuse of Drugs Act 1971. The offender thereby escaped what was likely to be a substantial custodial sentence. A little convolutedly, the HCA explained the matter thus.

Police, because they were stressed, this was an easy result, [and] they accepted it [the caution]. MA

Thus instead of charging the defendant, bailing him, and preparing a file with exhibits and forensics, the police took the easy option and cautioned him, which saved them a great deal of time and effort.

It is also the combination of police diverting the cases and the reluctance of the CPS to charge that had led to consequences for the volume of court work,

And it's a massive drop in ... our work, because the police are cautioning people, the CPS aren't charging people, that's the biggest change in the courts. [There is] a massive reduction in the work load. MA

The greatest change has been the significantly reduced volume of work that is going through... politics have driven a lot of diversionary work, that means that cases obviously don't see the light of day to court for a variety of reasons because the mechanisms are there to avoid that to happen. Cautioning is the big one, seems to be the flavour of the day at the moment. I don't think people are being charged with offences, to the extent that they used to be. CC

The poor review of cases also suggested that police were inefficient with such matters.

So that is a case that should have been referred [by the police] to the CPS, and someone should have had a look at that rather than the police just identifying it as a guilty plea and put it before the court. So that has now gone off for trial and the prosecutors have been directed to serve all their evidence by a particular date. I don't think it is going to be forthcoming, I don't think for a

moment the forensic expert's report is going to be available to the court in the next six weeks. BC

It was explained in Chapter 2, that the police now have the power to review certain cases and decide upon disposal. It must be remembered that Mrs May, whilst Home Secretary, reduced the number of files that the police would have to send for review to the CPS mainly due to cost (Bardens 2014). It is suggested that this is a retrograde step. One participant pointed out, quite forcibly, that the previous practice of sending CPS lawyers to police stations to provide pre charge advice, had been very beneficial,

...when the CPS first came into the police stations, that had a dramatic effect on the volume of cases coming to court because a lot of them were referred to the CPS and the lawyer said this is a load of rubbish, NFA, [no further action] ... Whereas before when it was in the hands of the police, quite frankly they just charged everything, irrespective of the quality of the evidence, and said let the court decide. BC

The general position of the participants can be summed up as follows. There was sympathy for the police and their lack of resources, but the process of diversion was frowned upon by the participants who concluded that some serious offences were not coming before the courts. Poor police files and inadequate review of files led in turn to substandard prosecution files, and cases which should have been viable proved ultimately to be evidentially unfeasible. Although the participants knew that police and prosecution failings were good for their clients, participants felt a general frustration that justice was not being done.

6.2.6 Injustice for the defence.

For the prosecution, the injustice stemmed from the combination of a court system that was trying to speed matters up, and organisations, namely the police and CPS, that lacked the resources to keep to the pace demanded by the courts. For the defence, the injustice for clients had, according to the participants, several more diverse causes. One cause already referred to was the demand by the courts for an early plea. This is backed up by the incentives of sentence discounts for an early guilty plea. That situation had been temporarily exacerbated by the court charge which was seen by participants as not only iniquitous, but also poorly thought out. The court charge may have led to some innocent defendants pleading guilty. When asked if his clients had pleaded guilty because of the charge, this solicitor replied forthrightly,

I can never say for definite that, but in my personal opinion yes. JA

The participants related in strong terms the pressure that was put upon defendants to plead, one describing the pressure as 'massive,' whilst another said that it was verging on bullying. In this respect, the EWCJS has undergone a transformation in the last few years. In addition, as in the US, the assumption can be discerned that trials are to be avoided by an inducement to plead guilty. The participants have related this pressure to plead guilty, a pressure born of the impetus for efficiency, to reduce delays, and to eliminate time spent in preparing and conducting trials. However, although, sentence indication has its supporters as a system that will reduce delay and be beneficial to all parties, (Freiberg, Seifman, 2001; Klein, 1976), it also has its ardent critics. Asher Flynn argues that sentence indication may increase the pressures upon defendants to plead guilty. This is because defendants interpret indications to plead guilty to a non-custodial sentence avoids a more

severe sentence. She argues that the benefits are 'questionable,' and such practices will damage the interests of the public, the defendant, and the victims (Flynn 2009).

Furthermore, the changes to legal aid, where only those in danger of custody could be assured of representation, has led to a growth in the number of unrepresented defendants,

So obviously those are cases where, in the past, we may have got legal aid and benefited financially out of them, we now don't get that and a lot of the clients are going in unrepresented, although utilising the services of the duty solicitor, who would probably say to them, 'You can go in by yourself, you are not at risk of custody,' so a lot of them tend to be unrepresented. BC

Not receiving adequate disclosure, or late disclosure, means a reduction in effectively advising clients,

In order to give him [my client] proper advice I have got to [have] the evidence, not accept what he tells me about something, I've got to be able to challenge him as well, and if he says I can do this and do that, I can say wait on a minute there's the bite mark, how did she get the bite mark unless she did it herself, I need to challenge him about things, and they will often turn round and say, 'OK well if he said that and that is me then I accept it.' So it's on us to do that ...wrong to waste court time. The advanced disclosure is absolutely fundamental ...for us to do the job properly. MA

[Disclosure is] a summary of what the case might be but no statements and then of course we're expected to fix a trial date saying which witnesses we

require or don't require when we haven't even seen the statements or what they might say [which] is frankly nonsense in those instances. KC

In a similar vein,

I do feel that my clients sometimes are not getting a fair crack because some are not very well set up intellectually, and they need proper advice from me and I am sometimes unable to give that advice because of the nature and the timing of the advanced information which I receive that day. HV

The court, trying to rush matters along, could lead to important factors being missed,

[there is]so much pressure upon us to conclude things quickly , sometimes occasionally we lose the interests of justice; and these matters should be looked at, sometimes you should sit back. MA

It was considered that injustice to the defence basically stemmed from the drive for court efficiency,

It's one of these things where the emphasis is on court efficiency at an expense of justice to a defendant. GT

I think eventually something big is going to happen of a case of injustice, because there is this demand that everything is shovelled through [the courts] at the quickest possible pace. That is regardless of whether the defendant is represented or not. CC

The participants were unanimous that all the difficulties that presently beset attempts to maintain justice for the defendant stem, directly or indirectly, from the efficiency programme.

6.2.7 An Elephant in the Room

Perhaps the largest elephant in the room is the 'offence to charge' time.

A barrister was convinced that the amount of time from offence to charge had grown significantly.

So I am getting a bog standard punch up in a pub type case which should be dealt with in a matter of 6-9 months at the outset, I am getting those cases now ... two to two and a half years after the offence. Now, that is unfair to the defendant because the defendant's life is kept on hold for two and a half years, and it's unfair on the complainant because, for example, a punch up outside a pub, how is someone able to recall the detail of events two years down the line? It's difficult to do that [after] 3 months, 6 months...two, two and a half years is impossible. I have seen a lot of cases now that are taking...too long to get to court. PD

This view was endorsed by other participants, who took the view that the offence to charge time was a lacuna when compared to the time strictures imposed when a case did eventually come to court,

[some defendants] have been on police bail for a very long time ...there's no excuse for this, the person has been on bail for three months, six months, over a year in some cases, and then we're expected to, from the point of charge to the point of trial, deal with that in almost six weeks and that feels a bit inequitable. KC

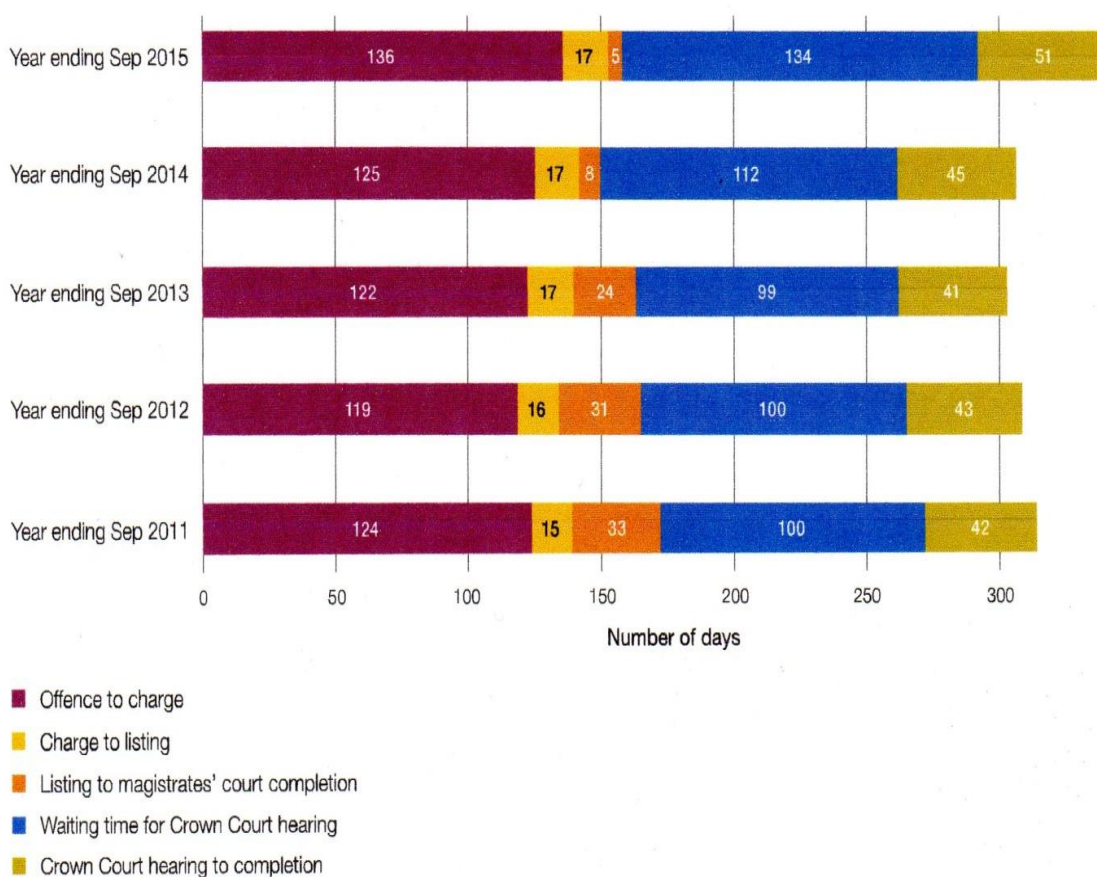
In the magistrates' court, the time from offence to charge is much greater than the total process time in the court. For example, in the year ending September 2015, the offence

to charge time in the magistrates' court was 62.6% of the total waiting time from offence to completion. Offence to charge times has shown a steady and consistent increase from 2011 to 2015, rising 9.1% during that period. The PAC believes that this increase may be because more effort is being invested up front to ensure cases are ready for court, and think that this is shown by more cases being resolved at the first hearing. The thesis findings do not support that contention. The participants stated that more trials were failing because the CPS was unprepared, and this contention is supported by the evidence from the NAO that more cases are now being thrown out if the prosecution are not ready ('cracked') rather than being adjourned to a future date. In 2014-15 6% of 'cracked' trials were because an adjournment was refused, compared with around 2% in 2010-11 (NAO 2016).

Nevertheless, the growth in offence to charge time has not made the CPS fully prepared to deal with its cases. For instance, in 2015 the CPS had not reviewed 38.4% of cases reaching court (NAO, 2016). Furthermore, even if some of the time spent in the offence to charge period produced an increase in cases being resolved at the first hearing, this small benefit has not resulted in an overall reduction in waiting times from offence to completion.

Waiting times (days) from offence to completion, Crown Courts 2011–2015

Crown Court cases are taking longer to progress through the system



Note

- 1 This figure includes historical sex offences. This may have a significant impact on the length of time between offence and charge as victims may not report crimes for some years after they occurred.

Source: National Audit Office analysis of Ministry of Justice data

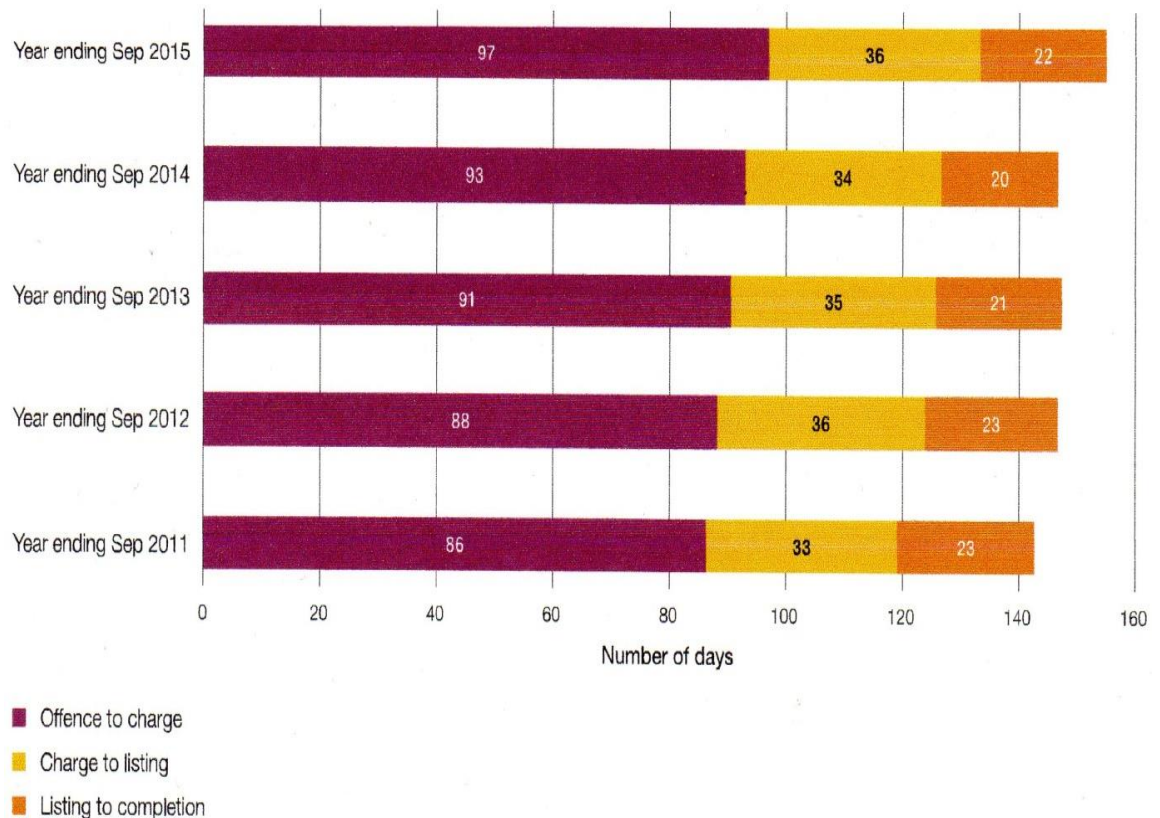
Fig 4. Efficiency in the criminal justice system. NAO Report. Published 1st

March 2016. Fig 4 p.15. (NAO 2016)

In the Crown Court, offence to charge times show a marked 8.8% increase in the year to September 2015, and the waiting time for Crown Court hearing has jumped 19.6% to 134 days from 112 in the same time period (Fig 4). Magistrates court offence to charge times have shown a steady increase of 12.8% from 86 days to 97 in the period 2011 to 2015 (Fig 5).

Waiting time (days) from offence to completion, magistrates' courts 2011–2015

The total duration of magistrates' court cases (days) has increased slightly



Source: National Audit Office analysis of Ministry of Justice data

Fig 5. Efficiency in the criminal justice system. NAO Report. Published 1st March 2016. Fig 5 p.16. (NAO 2016)

The findings give an alternative reason for the increased offence to charge times than that offered by the PAC; namely the lack of resources for both the CPS and the police. The thesis findings and the PAC reports show the CPS and police under capacity stress, which is the likely cause in the growth of offence to charge times.

On the 3rd April 2017 police bail was limited to a basic 28 days (Lewis and Rudd 2017). The aim was to reduce the amount of time suspects are on police bail. However, this measure is unlikely to change the offence to charge time and could actually exacerbate it. One

participant observed that the use of the voluntary interview is actually beneficial to the police.

It is beneficial for the police because that defendant then is not released on conditional bail. There is no one measuring how long this person is subject to an investigation. GT

The reason given for this practice was that,

It is resources. They haven't got the money to investigate and prosecute the way which they could [in the past]. BC

Considering the strict timetables that the courts are attempting to impose when cases have come to court, it is a lacuna of the criminal process that the significant offence to charge time is not effectively overseen to produce a proper and consistent management of the pre-charge period.

6.2.8 Morale

The solicitors unanimously concluded that morale in the profession was low. The mildest response was that [morale is] *'pretty low, as you can imagine'* KT. The more common theme was that [morale] *'is at an all-time low.'* MA

But morale is awful. It is difficult to raise enthusiasm to do a case well when you are being paid a fixed fee for doing it, and a pretty piss poor fixed fee as well, if you will excuse the language. HV

Fee cuts and treatment by the government was only part of the problem. The actions of the government had also introduced other difficulties.

the administrative burden that has been put on us, I think is really getting a lot of people down without a doubt. MA

The result was that the legal profession was living, as one solicitor described it, on 'tenterhooks', wondering when and how the next measures would fall.

Morale was also fundamentally connected to what was happening to the profession, and the regard in which it is held,

It's very hard to keep seeing injustices all the time because the government don't want [criminal law] serviced anymore, and it's what our justice has been based on for years and it's not going to be there much longer, We are going to be like America, if you want justice you pay for it and, if not, you get that bloke whose got forty other cases and you wait for him to do a poor job. I am afraid. Not very optimistic at the minute. JA

There was a strong opinion that the government wanted to emasculate the criminal legal fraternity, and that the measures taken were damaging professional standards,

I don't think the government want anybody to be doing crime. They are trying to get rid of the CPS by putting everything into boxes, categorising the sentences so a computer can decide what is going to happen to you, they are not interested in the profession which I think is losing its professional integrity, they just want someone to stand up and say, this, this, and this...box 8, 9, and 10. MA

A considerable sense of vocation was expressed by the solicitors, together with sadness of what had come to pass,

I think it is less worthwhile [the profession] now. You come into this profession because you want to do this type of work, you enjoy this type of work, I chose this field because yet again I was interested in criminal law, I wanted to come out and be an advocate. However, financially trying to survive with what we are dealing with at the moment is the factor that is making it less worthwhile basically, because you need to be rewarded for the work that you do. If you feel you are not being rewarded then it becomes a pointless exercise when you have been doing the job for that many years, and you enjoy the job. It is a shame to find it in this kind of position now. MG

[morale is] I think low... I go in most days and I think right, be cheerful for the day and within I think about a minute and a half, somebody's glum face will come in looking very miserable and automatically you're thinking 'Oh God, I'm still in this shit job,' and it's not a shit job as such... it's the situation that... makes it feel like a job that I wish I'd never started doing now. And the reasons I came in wasn't for big salaries, I could have gone into commercial work quite frankly, ... I enjoyed the whole thought of people getting justice, whether guilty or not, fair hearing, the right results. JU

There was apprehension concerning what was going to happen to many firms, and also the viability of the profession in the long run. This solicitor pointed out that the lack of young blood means a dying profession,

There aren't any new, young, sharp lawyers coming forward. We are, which is the requirement of the government as far as I can see, doing as little as possible on small fixed fees and I deprecate that. HV

Not surprisingly, the unanimous advice that would be given to any aspiring lawyer was: do not come into criminal advocacy. The following comments come from a recently qualified lawyer who would advise new entrants not to enter criminal law,

I would say no, to be honest. To do with the profession as it is, but also the debt of getting there as well, I think people are a bit deluded when they go into the profession thinking ...this is a stable job I would say they think it is, and probably a well paying job, but perhaps in other areas of law but certainly not in crime, but I don't think there is any stability whatsoever, I don't think there is any job security doing criminal law I must admit, I am not sure I would do it again, knowing what I know. KT

However, the solicitor wistfully remarks at the end of the above quote, '*I love this job.*'

This lament was a common theme amongst the participants,

It's a shame because I love it, you know. KC

A thoughtful and dismal prognosis was made by this solicitor, in respect to the future development of the solicitor profession,

I think we will have blue coats and red coats. We will have a prosecution service and a public defenders service, there will be one person at court maybe two, who will represent everybody if they qualify for instance on benefits or a certain amount of money, and anything else you need to pay. JA

No, no, it's a shame... and it's not just our profession, it's not ... justice. It seems everthing is cuts...and it's not what society is based on, it's a shame. JA

Thus a great many factors, including financial insecurity, poor rewards, increased administration, and a perceived diminution in professional respect, have combined to produce a marked deterioration in lawyer moral.

6.2.9 Early liaison between prosecutor and defender, and a seamless process.

Behind governmental and ministerial thinking is the idea of a seamless court where disclosure is prompt, there is close liaison between defence and prosecution, and trial dates are then fixed and not subsequently altered.

One solicitor gave this thoughtful appraisal on liaison,

I still think there is a breakdown of communication there between defence and prosecution...

There are certainly attempts, I think, to get everybody on the same page but I do not think it necessarily works yet, I would not call it seamless, I definitely would not call it seamless. KT

An appraisal was made by this solicitor that the desired for liaison between defence and prosecution could not happen due to CPS lack of resources. He highlighted the great difficulty in liaising with the prosecution,

So it is impossible to liaise with the Crown Prosecution Service in any meaningful way other than at the court hearings themselves. Letters, as I have already told you with a degree of asperity, go unanswered. I understand why but it makes one's job difficult, and I find that dealing with Crown Prosecution Service Officers at court is very, very difficult because they are pressed.HV

The same solicitor concluded that,

Seamlessness is a joke in the magistrates' court. HV

Even trying to communicate with the CPS via telephone was considered to be impossible by the participants,

You pick up a phone and nobody picks it up at the other end. It's awful...

Nobody is there. I am sitting on the end for a quarter of an hour and give up in the end because nobody picks the phone up. So, its just falling apart. CC

nobody picks their phone call up either. JU

The difficulty is, whether they are identified or not, what practically needs to happen is if I phone the CPS in Birmingham and I need to speak at some point to Mr x or Mrs x who is dealing with the case, and the problem is that half the time I can't get through to the CPS. Sometimes I have got through to the CPS and they just put the phone down on me. PD

Letters are also not answered,

I used to send letters regularly which got ignored by the court and the CPS, so I got bored of doing it and I mean we've got, our resources now secretary wise is quite scarce as well so you're not going to keep ping out letters that no one's responding. JU

From the answers to questions on court technology, it became obvious that the implementation of the technology and its use was not uniformly applied in the courts. Most participants were sceptical about the promised performance of the new technology. The new technology was seen as a mixed blessing and the participants gave myriad views

on its implementation and future usefulness. Several participants bemoaned the lack of training for users; others felt that the computer systems were slow and 'clunky.' Although the use of videos saved time in that it obviated the need for lawyers to visit clients in prison, even that advantage was considered a mixed blessing.

We are at the start of what the government hopes is a digital transformation in the courts. A fairer picture of the success of the technology and its implementation can only be made at a later date.

Despite the fact that the participants considered DCS, (Digital Case System), the forerunner of the new Crown Court *Common Platform*, was slow, there was some optimism that the *Common Platform* software programme could unite all the agencies that tend the court business. It was described thus.

Common platform is something where, if I understood it, a shared server whereby if a chap is charged tonight with an offence and comes and sees me tomorrow, I can access this server ...and access that paperwork the very next day or within a very short period of time anyway, often days or weeks before we go to court. I think that would be superb, I really do. It would be so much better, if the client was in or if I could encourage the client to come in, and hopefully if I have been to the police station as well, we can then get a head start and have an effective first hearing and moving things along. With that disclosure I can make representations to the CPS, I can make representations to the court, start interviewing witnesses, start preparing the case. I can start doing the legal aid application so much earlier and get that ...to save time

ultimately down the line. The upshot is that I am waiting for that first hearing date and taking instructions at court. MA

The present stage of digital development is still in relative infancy, although this favourable comment was made in respect of inter court communications,

Something that does speed up the court process is the procedure whereby communications take place quicker between courts. I notice that it is much easier now to phone up High Wycombe magistrates court and get permission to deal with a remmittal or a remission or something like that.HV

However, the present situation was summed up by one participant as follows,

The digital case system for the Crown Court is a brilliant idea... but you have got to rely on somebody putting the info into the system. If it does not happen then it all falls down. [On occasion] nothing has been updated... [with the result that] a poor little CPS bod at the Crown Court is scrambling around trying to upload things to the system. RF

Thus the advances in technology are limited to the amount of human input. A lack of human resources to upload data could nullify advantages that can accrue by the use of technology.

6.3 SUMMARY

All the lawyers agreed that there was now a strong no adjournment culture in the courts, it was often applied inflexibly and without sensitivity to the consequences of a refusal to adjourn. There was an increased court pressure on encouraging defendants to plea early,

and plead guilty. There was disagreement on whether the courts were actually swifter than before, although the majority of participants thought that they may be quicker.

All the participants were in agreement that the CPS was under tremendous pressure, due to staff cuts and a lack of resources. The CPS could not keep pace with the new court tempo, trial disclosure was often very late, and its prosecutors were often unprepared for cases. The injustice for victims occurred due to several factors, but mainly because cases which would otherwise have been perfectly viable failed due to a lack of CPS resources. The general consensus was that the police were also afflicted by lack of resources and a lack of experienced officers. Therefore, the files they passed onto the CPS were often flawed. Furthermore, the CPS undercharged offences and the police cautioned or diverted matters inappropriately.

The defence were subject to a court system whose pace, combined with poor or late disclosure, militated against the provision of sound advice to clients. The changes to legal aid have led to an increase in the number of unrepresented defendants with adverse consequences for justice.

Although the work of the probation service was admired, there was agreement that the service suffered from a lack of resources and the standard of its reports had fallen recently. Stand down reports, however, were seen as an improvement, and actually sped up the court processes.

It was unanimously agreed that morale was low in the legal profession. There was genuine concern about the future of the profession. In addition to the financial worries engendered by new measures, there was real concern about the standards of the

profession which were seen to be falling, as a result of the tick box measures that see the service of advice to clients in simple assembly line production terms.

Leveson's hope of a seamless system exemplified by early prosecution and defence liaison was judged to have been missed, and indeed by some as impossible to achieve without a much better resourced CPS.

CHAPTER 7

ARE THE CRITERIA OF EFFICIENCY SATISFIED?

7.1 INTRODUCTION

The aim of this chapter is to examine the effects the efficiency measures have had upon the EWCJS. Firstly, there is an examination of how the measures have fared on the government's own criteria of success, such as reducing delay and getting it right first time. The findings of the research will also be examined, taking into account the evidence of the NAO and the PAC on the efficiency of the criminal courts. The analysis will be aided by a new concept of Functional Efficiency.

The vision encapsulated within the various governmental and ministerial papers and reports seem to be, in the main, sensible and plausible. The ostensible adoption of the Leveson report as the MOJ's 'bible', as testified to the PAC by Mr Heaton, Permanent Secretary to the MOJ, gives some credence to the government's overall strategy (PAC 2016b). It is seen to be almost a moral imperative to reduce delay in the EWCJS. Delay diminishes memories and evidence, causes anxiety, and can lead to injustice. The MOJs idea of getting it right first time, with correct charges and prompt disclosure, followed by early liaison between identified and designated defence and prosecution lawyers, would be a sound start to the new EWCJS foundation.

The adoption of a no adjournment approach is now entrenched in the magistrates' and Crown Court process. The EGP scheme, together with Better Case Management, will ensure that uncertainties are reduced and that information flow between the parties is enhanced. Backing up these initiatives will be a quantum leap in IT and digital working.

The flow of information between parties and agencies will accordingly be markedly enhanced, leading to further efficiencies and greater timeliness. The effect of the governmental, ministerial, and departmental measures will produce “reforms [that] will put the victim first; make digital working the norm; reduce unacceptable delays and the time spent processing straightforward cases; and end the unnecessary complexity and outdated working practices that weaken our system” (MOJ 2014c, p.5).

The EWCJS will be transparent, accountable, and responsive to local needs (WPSS 2012) and, “our vision is a justice system that is more effective, less costly and more responsive to the public” (MOJ 2014b, p.5).

Importantly, the whole procedure is intended to be 'holistic'. Agencies are implored to rid themselves of their 'silo' mentalities and work together for the common good of the EWCJS. A seamless system, in which all the agencies of the EWCJS coordinate their efforts, seems the right approach.

However, the last point also highlights a significant weakness in the strategy. It is clear from the evidence given to the PAC, that there is a lack of incentive for the various agencies to work together and to coordinate. The witnesses to the PAC put great faith in the ability of the emergent CJB to coordinate and bring into being a sharing of good practice (PAC, 2016b). Nevertheless, it remains the case that there is no one body with executive power to ensure that the agencies do liaise and cooperate to the degree required by such a holistic approach. Furthermore, just because the members of the CJB may agree certain policies, this does not mean that those 'on the ground' are capable or willing to carry them out.

At the outset, there may have been confusion in governmental and departmental thinking which muddled savings with efficiency. “Efficient is not synonymous with inexpensive. Rather, it refers to an optimal trade-off between cost and function; a system may simultaneously become less expensive and less efficient, if cost savings are offset by loss of productivity” (Coleman 2015, p.1777).

There is little doubt that efficiency in the EWCJS could be increased by further judicious expenditure, the adoption of scale economies, and the training and recruitment of more staff, but this strategy is eschewed (WPSS). Accordingly, as already noted, any measures adopted to change the EWCJS had to be made in accordance with an austerity regime. There has, therefore, been a great urgency to decrease outlay, to make cuts, and to reduce the numbers of staff employed, all conducted under the umbrella of the promise to deliver greater efficiency and flexibility (MOJ 2014a).

7.2 DELAY, GETTING IT RIGHT FIRST TIME, AND OTHER CRITERIA OF EFFICIENCY.

There are two central criteria of success central to the accomplishment or otherwise of the government's strategy for the courts, namely, the reduction of delay by increased efficiency and ‘getting it right first time.’ The two are closely related. ‘Getting it right first time’ has the corollary of reducing delay. As we have seen, the reduction of delay is also claimed to result in the attainment of justice. However, since the publication of the WPSS, delays in the Crown Court have actually been greatly exacerbated in that the “number of cases outstanding in Crown Court has increased by 34% since March 2013 (51,117 cases outstanding as at September 2015). The backlog has fallen since the end of 2014, but there was a small rise in the most recent quarter” (NAO 2016, p.12). “Victims and witnesses are having to wait longer for their day in court: 134 days between the case

leaving the Magistrates court and the start of the Crown Court hearing, compared to 99 days two years ago” (PAC 2016b, p.5). Examining the situation over a longer time period is more perspicuous. Witness Support published a damning article in 2015, citing that, “the Crown Court the average time taken for a case to be listed for trial has climbed by over 55 per cent over the past decade and a half, increasing from 18.6 weeks in 2000 to an average of 29 weeks in 2014.” Furthermore, the article points out that, “there are now over 54,000 outstanding cases waiting to be heard in the Crown Court, up 75 per cent since the year 2000,...[and the] lack of capacity in the Crown Court is the main driver of increased waiting times” (Rossetti 2015).

To put the figures referred to by the PAC in context, the rise in the waiting time and the increase in outstanding cases for the Crown Court is partly due to the abolition of committals in 2013. The Crown Court was inundated over a short period with cases simply being sent to the Crown Court without the benefit of the magistrates’ courts waiting time cushion. The abolition of committals meant that, for a time, a much larger number of cases would be arriving in the Crown Court from the magistrates’ court from May 2013 onwards. It is suggested that this effect should have been anticipated but no provision was made to cope with the extra demand upon the Crown Court (Appendix L).

The cause of recent delays, 2013 onwards, was also partly due to bad management by the HMCTS and the MOJ. In the rush to lower costs, the HMCTS reduced the number of sitting days for judges during 2014, leading to a backlog of cases (PAC 2016b). The situation was not helped by the increased number of more complex cases, including fraud and historic sex cases which increased the average trial time. Indeed, according to evidence from Natalie Ceeney of the HMCTS, the average trial length in the Crown Court has increased

by 26% over the past five years (PAC 2016b, p.29; Appendix M). However, the concept of delay is not unproblematic and the simplistic view the MOJ has adopted regarding delay is unhelpful in dealing with the problem (Appendix N).

Another of the maxims of the MOJ efficiency drive is, “to create a criminal justice system that is faster and right first time” (MOJ 2014c). In getting it right first time, prosecutors and police would cooperate to “make appropriate charging decisions, based on the fair appraisal of sufficient evidence, with proportionate disclosure of material to the defence” (Leveson 2015, p.9). Getting it right first time would speed up the whole of the criminal litigation process.

One participant described the advice given by the CPS to the police as a lottery, bemoaning the lack of consistency. The same participant observed that, because of the forced retirement of experienced police officers, the new officers lacked experience and did not have sufficient training to put a strong evidential case before a magistrates’ court. There were complaints from others regarding the timeliness of disclosure throughout the criminal process, ranging from 'streamlined' disclosure to trial disclosure. One participant stated that disclosure had to be chased up and, a day before the trial, e-mails with bundles of documents would be received from the CPS. However, the court culture was to some extent indulgent to the CPS in that the court expected that the CPS would be late in serving evidence because they are overworked and understaffed. Another said that, nine times out of ten, disclosure did not arrive in time. When pressed as to the accuracy of the proportion he held that the figures were indeed correct. Another participant gave a concrete and current example of awaiting disclosure for an imminent trial, where a vital

piece of information regarding which of two potential witnesses should be called to trial, was missing. He went on to recount,

In the interests of fairness, things should be done in a timely fashion such as disclosure and so it is a daily struggle I think. We have trials where we have urgent faxes from the CPS the day before the trial, here are section 9 statements, can you agree them basically. CCTV served on the day expecting us to agree that CCTV. So trying to fit things into a shorter time span but then not actually delivering the material on which to be able to represent somebody in a timely fashion is a struggle. MG

There simply cannot be early liaison between the prosecution and the defence if disclosure is late or non-existent, for the defence cannot meaningfully liaise unless they know the case against their client. Furthermore, poor review and poor files sent to the CPS by the police slow down the liaison with the defence because it takes time to eradicate file inadequacies.

The participants' observations received support from an unexpected quarter. The DPP confessed a shortfall in standards in her evidence to the PAC, when she admitted that the CPS "is working with the police to improve the quality of files it receives, that national file standards on evidence are being piloted and will roll out in the summer" (Hillier 2016, p.11).

It must be remembered, that the government reduced the number of files that the police would have to send for review to the CPS, mainly on grounds of cost. This is a retrograde step. As noted above, one participant pointed out, quite forcibly, that the policy of CPS

lawyers being sent to the police stations to provide pre charge advice had been very beneficial, in cutting out the 'rubbish' charges sometimes proffered by the police.

There is academic support for the wisdom of this view, since,

It is important to have procedures in place to enable the prosecutor to screen the charges laid by the police at the earliest possible stage. It is quite clear from the experience of various jurisdictions that the involvement of an independent prosecuting authority from the outset dramatically increases the opportunity for identification of matters that should not proceed. (Dandurand 2014, p.404)

Getting things wrong at the pre charging stage can have clear ramifications for resources and restricting the scope of PCA is very likely to be a false economy.

Early liaison between the prosecution and the defence is considered as a necessity by the MOJ for the future smooth running of court business. A very experienced HCA related this encounter accordingly,

At the better case management meeting last week the CPS stood up and said, "we are now going to identify the paralegals and the lawyers involved in each case to you so you can contact that person directly, but we accept that those people are completely under stress, people are completely overwhelmed with the workload they have got and they won't necessarily be able to get back to you." So the whole system has been set up with a proforma to send letters out to us to tell us who to contact but that communication is not necessarily going to be very effective. MA

Another experienced Solicitor said,

The fact of the matter is there is no real way of liaising with the prosecution other than at court because the Crown Prosecution Service, with whom I have a vast amount of sympathy as individuals are far too pressed to spend time dealing with enquiries outside court, they are not there. HV

As stated in chapter 2, section 5.1, reducing the legal aid bill is equivalent to increasing productive efficiency. However, the participants report that, as a consequence, there are now more litigants in person. As testified by one participant, a consequence of the legal aid economies is that, *'there is a significant amount of pro bono work that takes place, very significant, pro bono.'* HV

These observations, that there are more unrepresented defendants appearing before the courts caused by the new legal aid regime, is supported by independent survey research conducted by the Bureau of Investigative Journalism. The “Bureau’s survey noted a rise in concerns about self-representation in remand and bail hearings, up to 59% of all magistrates from 41% between the two studies. The rate at which people were representing themselves during sentencing had increased from 15% to 23%” (McClenaghan 2015).

The increased burden upon the EWCJS has been noted by others who remark upon, “a sharp increase in the number of unrepresented accused and an increased burden on the already congested court system” (Byrom 2014, p.4).

There are clear disadvantages in having unrepresented defendants or litigants in person. A court will bend over backwards to explain the situation to the defendant, will ensure

that matters are understood, and ask them to think carefully about their position. This raises a difficult situation for the arbiters of justice in that,

On the front line dealing with the crisis are judges, court clerks and magistrates who find themselves in court with a dual, contradictory role. On the one hand, they are the decision makers, tasked with making the final judgment. On the other, they are in reality called on to attempt to impartially advise parties who do not understand the complex, alien process they have to work through. (Lucas. 2015)

Furthermore, there are obvious consequences for court business. Shadow Justice Secretary Sadiq Khan reacted to the Bureau's findings, saying,

The government were warned their cuts to legal aid were a false economy but they just stuck their fingers in their ears... lumbering our courts with extra costs and slowing down the legal system... The wheels of our justice system are grinding to a halt. (McClenaghan 2015)

The PAC was scathing in its criticism of the MOJ in respect of civil legal aid, observing,

Perhaps most worryingly of all, it [the MOJ] does not understand, and has shown little interest in, the knock-on costs of its reforms across the public sector. It therefore does not know whether the projected £300 million spending reduction in its own budget is outweighed by additional costs elsewhere. The Department therefore does not know whether the savings in the civil legal aid budget represent value for money. (Hodge 2015, p.2)

The same arguments could easily and appropriately be applied to criminal legal aid. The MOJ have simply not explored the knock on effects of its measures and the impact that unrepresented defendants are having on the court process. It is suggested that the cuts in criminal legal aid are having a detrimental effect upon court business and cause additional delay.

The assumption is that by speeding up the courts and reducing waiting times one is automatically reducing delay. Even if we were to accept this rudimentary assumption, the evidence supports the contention that waiting times, and hence delay, have increased in the Crown Court.

This delay has been a result in part of ministerial bungling, a lack of anticipation of the effects of abolishing committals, and precipitate penny pinching such as reducing judge sitting days. In other words, even on its own criteria of success the MOJ have failed.

In the magistrates' court, getting it right first time, which would speed up the judicial process, is not happening. The CPS is overburdened and slow, the participants relate that its record on disclosure is lamentable. Early liaison between prosecutor and defence would seem to be impossible if the CPS remains underfunded. Reduction in legal aid has led to a rise in the number of unrepresented defendants with the imposition of likely further delay upon the courts. The granting of further powers to the police to charge certain offences is also seen as retrograde, and ultimately the cause of probable inefficiencies when cases come to court.

On the primary criterion of getting it right first time the government policy appears, so far, to be an abject failure.

7.3 THE HOUSE OF COMMONS PUBLIC ACCOUNTS COMMITTEE, AND A NEW CONCEPT OF EFFICIENCY

The performance of the various parties at the House of Commons Public Accounts Committee (PAC) held on the 17th March 2016, in respect of the NAO report on the Efficiency of the Criminal Courts, was very instructional (PAC 2016b). In attendance were witnesses: Richard Heaton CB, Permanent Secretary, MOJ; Natalie Ceeney, Chief Executive, HMCTS; and Alison Saunders, Director of Public Prosecutions.

The committee were very concerned about the welfare of victims and court witnesses. There were some striking failures in the knowledge of the witnesses before the PAC. What became evident from the questioning was the shunting of costs between one agency and another and the lack of incentive for agencies to work together. The witnesses put much faith in the new Criminal Justice Board (CJB) which they believed would get the agencies working together for the same ends. There was confusion in respect to the concepts of efficiency and a tendency to conflate efficiencies with cutting costs. The closest clarifying position was reached when Sir Amyas Morse, of the NAO, put it to the witnesses that the system was under considerable 'capacity stress'. In other words, the system was failing to fulfil its functions because of a lack of resources. Heaton had previously stated that the EWCJS was much more efficient by delivering the *same* service for 26% less resources. The answer reveals confusion at the heart of governmental circles: a confusion regarding technical, productive, and functional efficiency. The government and its civil servant believe that if an organisation is becoming technically and productively more efficient, then the organisation must be, by *fiat*, becoming more efficient in the fulfilment of its functions. This is a *non sequitur*. A simple and idealised example will help to explain.

Model:

WF. Workforce

AO. Actual Output.

TR. Training.

FO. Functional Output.

Tech. technology.

Δ delta, an increase

T. Time periods

FE. Functional Efficiency

FI. Functional Inefficiency

Assume, at time T1, the CPS have to deal with an average 1200 cases per week for there to be no backlog of cases. The case load is constant at 1200 per week. A hundred people are employed to deal with the case load, and the wage costs are £50,000 for the week.

Time T1.

Input. 1200 cases

Output. 1200

1200/ 100 persons

12 cases per person.

£50,000/ 1200

£41.67 wage costs per case

$AO/FO = FE.$ $1200/1200 = 1$ (or 100%)

We shall assume training is enhanced and there is an input of new technology. The numbers of workers are now reduced to 50.

Time T2.

Input. 1200 cases

Output. 1000

Backlog 200

1000/ 50 persons

20 cases per person.

£25,000/ 1000

£25.00 wage costs per case

$AO/FO = FI.$ $1000/1200 = 0.8333'$

Technical efficiency has improved because output per worker has increased markedly to 20 cases per person. Productive efficiency has improved as wage costs per case fall to

£25. In both a technical and a productive sense, there are marked gains in efficiency.

Functional Efficiency (FE) occurs when a technically efficient organisation is able to fulfil all the functions demanded of it. However, FE in our example has not been attained. A function of the organisation is that it produces 1200 cases per week. With the best will in the world, given its present workforce, it can manage only 1000. It is Functionally Inefficient (FI) to the tune of 16.67%.

At time T3, the organisation eradicates the FI by increasing the workforce to what we can call the Irreducible Level (IL). This can be defined as: the amount of resources (workforce) which is just sufficient given the levels of training and technology to maintain the FO.

Time T3.

Input. 1200 cases

Output. 1200

Backlog 200

1200/ 60 persons

20 cases per person.

£30,000/ 1200

£25.00 wage costs per case

Note here that, although the IL is enough to cope with current FO for the time period T3, it is not sufficient to eradicate the backlog that was built up in period T2. Other resources will have to be employed to be rid of the accumulation. Accordingly, Heaton's reply to the PAC is to be treated with some scepticism. The backlog of cases in the Crown Court had risen during the period under NAO review, the system was functionally inefficient because the system did not have the resources to produce the FO and there was a rise in the backlog of cases in the Crown Court. As a consequence, delays increased. In our own example, at T2 we have a backlog and without further resources or other inputs that backlog will remain.

The FO will change over time and circumstances. A fall in the number of persons being charged and coming to court will, *ceteris paribus*, reduce the FO. The concept of FE recognises that there are an irreducible minimum number of factors of production for the attainment of the functional output. Thus, no matter how good the technology available to the CPS and the level of workforce training, 100 lawyers would not be able to review, action, and trial all the current cases of the CPS.

FE is a concept which is ideally suited to examine state run organisations and agencies. In the private sector, output and price are determined by market forces. Output and price will also be determined by the type of market the firm is operating within. Thus, a competitive market will result in different output and price than oligopolies or monopolies.

In contrast, the output of a state run organisation will be determined not by market forces but by the demands of the managers of that organisation which, in turn, will usually be the output demanded by the government. Some outputs are not negotiable. For example, a court manager cannot say 'we have filled our quota this month', and refuse to accept a case.

The problem is that, for most state agencies, wage costs are the most significant outgoings and, therefore, the easiest way to lower costs is to reduce the workforce. To compensate for this capacity loss, the organisation then attempts to bolster workforce production through overtime, better training, better organisation, and improved technology. It should be noted, however, that overtime will increase production but not necessarily productivity. As workers work longer hours, they become tired and their productivity falls. The problem can be further illuminated by expanding our model.

At T1 we have:

T1 (WF1 (100) (TR, Tech,))FO (1200), AO (1200), AO/ FO= 1

Improvements in training and technology mean that the same functional output can be achieved with a smaller workforce. Thus, the WF can be reduced in number from 100 to 50. Hence:

T2 (WF2 (50) (Δ TR, Δ Tech))..... FO (1200), AO (1200), AO/ FO= 1

Diagrammatically, the improvement in technology results in the FE curve moving downward to the right from FE1 to FE2.

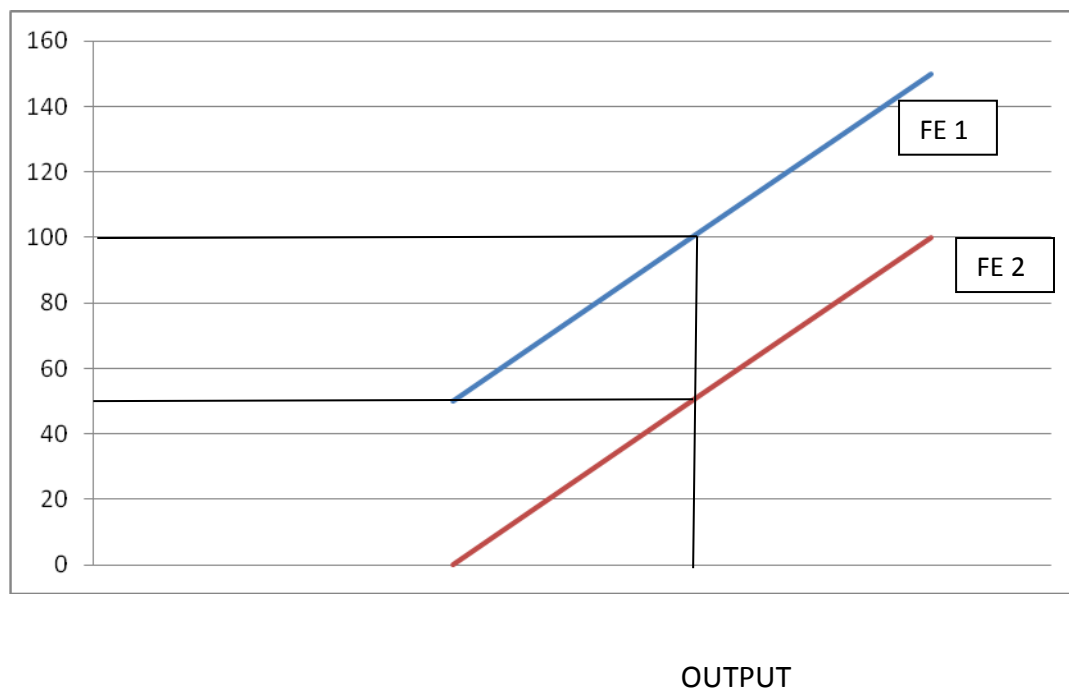


Fig 6. Technology shift 1: reduction in WF

The FE curve slopes upwards from right to left, showing that a higher level of inputs is required to reach the higher output demanded by FE. In the example, on the y axis is the Inputs in '000, on the x is the level of Output in '000 produced by the Inputs.

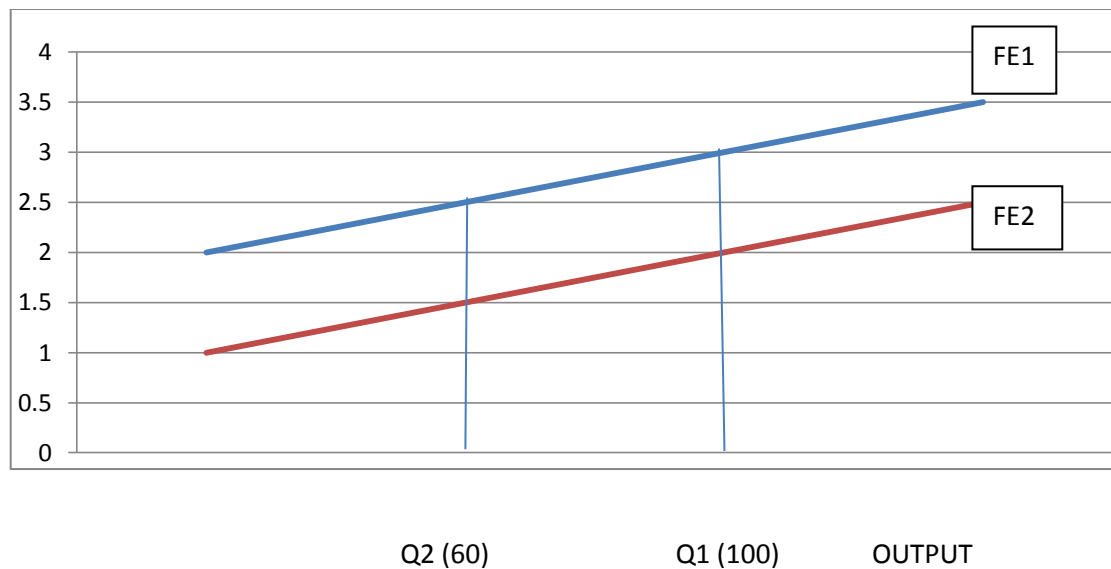


Fig 7. Technology shift 2: overcoming resource shortfall

In the diagram, at time T1, Q1 output is required. This output, given the level of technology, requires an input of 3,000. However, the agency is only provided with resources of 2,500, leading to a shortfall in output of Q2-Q1. In other words, the organisation is FI, and hence the FI is 40%. If, however, the organisation imports new technology, the FE curve can move downward to the right from FE1 to FE2. This is the strategy endorsed by the MOJ and HMCTS with digital working. With the curve at FE2 only 2,000 units of input are needed to be FE.

An organisation whose management desperately wants to reduce budgets will always have the temptation to reduce the WF even further, especially if it subscribes to the doctrine of continuous improvement. The first sign of FI is lower quality since people have less time to complete their work. Technical efficiency relates to how much output can be obtained from a given input, whilst maintaining quality. However, in the long run timeliness will also fall. Briefs will not be completed. Court delays will lengthen. Court orders will not be complied with. It is doubtful that the quality of review and preparation in the CPS could be maintained to previous standards given the dramatic fall in the

numbers of its workers. The standard of disclosure will worsen. There will be a tendency to skim read and quickly review in order to try and get through the number of cases that should be processed. The quality of preparation will fall, briefings will be less timely, and there will not be enough time to comply with court directions. We are simply not getting the *same* service for less. A fixation with productive and technical efficiency blinds officials to 'capacity stress'. The fact that Mr Heaton thinks that the system is 26% more 'efficient' acts as a screen to the fact that it is failing in fulfilling its functions. A fall in quality will occur before a fall in output per worker, as workers will initially scramble to fulfil quotas. However, the workforce can't give their full attention to every case, detail is missed, matters overlooked. Quality, and therefore, technical efficiency, will fall. Eventually, the workforce may be pressed so hard that burnout occurs so that total output could even fall over time.

The 'can do' attitude of management misses the whole point. An example comes from the PAC, when the DPP was pressed by the Committee (PAC 2016b). Asked why court orders were not being complied with, her response was that the CPS now had a system of tracking when they were not completed. The implication being that lawyers would be pursued to ensure that the orders were complied with. This 'can do' attitude masks the fundamental fact that resources may have fallen below the irreducible level required to fulfil FE. This 'can do' hides the fact that her organisation may be woefully understaffed and that the lawyers can't comply with the court orders because they are simply swamped by work.

The observations of all the participants in the study testify to the fact that the CPS is lacking resources,

They (the CPS) are understaffed, they don't have the resources. BC

They are badly served, in my opinion, by the service which they represent because it appears to me the system is that everything gets done quickly and that they get their files in the same way as Toyota get their parts, at the last possible moment before they get jacked onto the car...there are not enough of them to do the work. HV

No one in the CPS, I am not making excuses for them, have got the time I think to review files, [they] have been hit with a massive loss of staff and cut backs and forced to make savings, they can't cope with the work they have got without a doubt, and are being asked to do more in the preparation of these sort of things. MA

A less complementary, but relevant comment is that,

the CPS will come up with some rubbish excuse why they have not done it, more to do with the fact that they are understaffed and they have got no money. KT

These comments would not come as a surprise to the CPS Inspectorate on Advocacy,

Further budget restrictions have been imposed since the last review and a new business model has been devised under the Refocusing the CPS programme. This has resulted in a reduction in the workforce and office closures, all of which impact on the ability to deliver advocacy services which are truly value for money. (HMCPSI 2015, p.i)

The kind of dogmatic 'can do' attitude exhibited by the DPP is positively harmful in that it hides the real problem of the organisation, namely a lack of capacity. The lack of capacity

is shown by timetables that slip and by missed schedules. A “missed schedule indicts the planners, not the workers” (DeMarco 2011, p.57). Cutting the slack of an organisation robs it of flexibility and the ability to adapt and respond to different circumstances. It is an adherence to the 'myth of total efficiency' that damages the present and future performance of organisations (DeMarco 2011). It is reasonable to suppose that some of those managers who have the 'can do' attitude are those who are themselves under pressure, their careers and reputations are often on the line if they do not deliver.

CHAPTER 8

EFFICIENCY AND THREE IMPORTANT BODIES

8.1 INTRODUCTION

It is revealing to examine how some of the efficiency measures have impacted upon three very different bodies which are essential to the running of the courts and the EWCJS. Any impairment of these bodies will have consequences for the efficiencies of the courts and the EWCJS in general.

8.2 THE CENTRAL POSITION OF THE CPS

The FE of the CPS is central to the proper functioning of the EWCJS. The EWCJS is an integrated system in that the actions of one part have ramifications for all the others. If charges are to be proceeded with then evidence needs to be disclosed to the defence. The defence may wish to liaise with the prosecution in respect of charges, overall evidence, alternative disposal of the case, and query whether prosecution should proceed on public interest or evidential grounds. The CPS is under a duty for the constant review of cases, which implies close liaison with the police, and the consideration of additional evidence. Witness care, and the decisions on which witnesses are to be used and which are to be offered to the defence, often take a great deal of time.

In the whole EWCJS the CPS is the vital lynchpin. It is the conduit organisation upon which the rest of the EWCJS depend. If properly run with adequate resources it will help in ensuring that the rest of the EWCJS will function efficiently. If the CPS is efficient then, *ceteris paribus*, other parties will tend to be more efficient. If the defence know the case against them and are given the evidence, there will be better informed decisions and less

‘taking a chance.’ For example, the defence, if ignorant of the true strength of the case against them, may plead Not Guilty when there is actually little chance of an acquittal. Furthermore, with an efficient CPS, the defence will not be spending time chasing up the CPS for reconsideration of evidence, unserved witness statements, missing forensic reports, adequate disclosure, and unused material schedules. The Leveson model may be considered the ideal. Cases are effectively evaluated by CPS, and correctly charged (or appropriately and justly disposed of). The getting it right first time mantra demands that there is then immediate and good liaison by the CPS with the defence, and good and effective communication with the police. There is appropriate support to the witnesses and victims. Throughout, there is care of the case which is kept under constant review.

The evidence of the participants show that the reality falls far short of the ideal.

Disclosure is late or non-existent. There is little or no liaison between the defence and CPS. A lack of resources means harassed and overworked prosecutors. Gaps in staffing are made up by agency workers who in court often may have little or no powers to decide upon the amending or disposal of cases.

The result is a phenomenon we have come across before: namely, that of cost shunting between the various elements that make up the EWCJS. The NAO have observed,

The system as a whole is inefficient because its individual parts have strong incentives to work in ways that create cost elsewhere. As there is no common view of what success looks like, organisations may not act in the best interests of the whole system. For example, courts staffs seek, under judicial direction, to ensure they are in use as much as possible by scheduling more trials than can be heard so that there are back-ups when one trial cannot proceed. This is

both a cause and a result of the inefficiencies in the system, and leads to costs for other parts of the system, for example witnesses who spend a day waiting to give evidence for a trial that is not then heard, and who may then be more likely to disengage from the process. (NAO 2016, 2.7-2.13)

The cost shunting by the courts shunts costs onto victims, witnesses, the CPS, the police, and the defence. Lack of resources by the CPS may lead to late or even non-disclosure of vital evidence to the defence, who then bear the inefficiency costs shunted by the CPS. The central position of the CPS in the EWCJS makes its successes or failures paramount in helping to determine the performance of the other agencies.

I would say that the weakest part of the criminal justice system at the moment is the CPS...since the cuts they just can't cope. BS

This comment receives much backing from the report on the workings of the TSJ, which shows clearly that the CPS are failing to carry out many of the basic functions allotted to it by TSJ (HMCPSI 2016a).

As an indicator of possible lack of resources, the above CPS report commented; “We found that failings in the quality of police files were not being addressed by the CPS with a lack of effective, real time feedback”(1.19). In addition, the “file examination revealed that where the police file failed to comply with the NFS there was no evidence on the file this was raised with the police in 67.9% of relevant cases (127 out of 187). It appears that the CPS is not addressing police non-compliance adequately which does not assist in driving up standards” (4.39).

Even when files are received by the CPS it would appear that the review of files is not fulfilled. It is a fundamental principle of TSJ is that the CPS conducts an initial review of all

files before the first hearing. “In 69.0% of cases where a guilty plea was anticipated there was no record of this review on the file. In cases where a not guilty plea was anticipated 22.8% did not have any record of this review. Both the quality and timeliness of initial review by the CPS needs to be improved” (HMCPSI 2016a, 1.21).

All the participants complained of late, poor, and inadequate disclosure by the CPS. The report gave some quantification to this commented failure by noting that even the Initial Details of the Prosecution Case (IDPC: the most basic and minimal disclosure) was late or non-existent. “However, the CPS is poor at ensuring that IDPC is served on the defence in advance of that hearing. In 114 of the cases we assessed the defence solicitor’s details were known before the first hearing, but in only 19 of these (16.7%) was the IDPC served on them in advance of that hearing” (1.23). In 2014 a report on disclosure was produced by Lord Justice Gross at the request of the Senior Presiding Judge. At paragraph 218, this Magistrates Court Disclosure Report (MCDR 2014) urged that “A CPS lawyer should review the file in advance of the first hearing and identify the issues, including any that may arise with regard to disclosure” (Gross 2014). It is sad to relate that, if anything, CPS performance on disclosure and review has become worse (Appendix O).

A lack of review means that the CPS may be ‘blind’ to the real nature of a case sent to them by the police. Without proper review there is no way the CPS can get things right first time, they simply do not know which course is right. Of course, early liaison with the defence can make clear the real nature of the relative positions of prosecution and defence. According to the participants, however, such early and effective liaison was non-existent. The TSG report laments, at 6.8, “that there was very little evidence of any engagement with the defence prior to the first hearing.” In cases where details of defence

lawyer was known, there was, in only 1.8% of those cases, an attempt by the reviewing lawyer to attempt early engagement with the defence (6.9).

The participants have put CPS failings down to a lack of resources. This, according to some participants, has been compounded by increased demands made upon the CPS due to the allocation of resources to rape and DV cases.

The CPS is often not well prepared. Its performance in disclosure is dreadful, its early liaison poor to the point of being almost non-existent. The Leveson model is not realised. Leveson was aware that his model of efficient prosecution would not be brought to reality unless there was adequate funding. There is an irreducible core minimum of funding below which [the CPS] cannot deliver services (Leveson 2015, p.8).

A parliamentary debate upon the CPS took place on the 23rd June 2015. The Solicitor General argued, quite simply, that as the guilty plea rate and the conviction rates were up then the CPS were acquitting themselves as a law agency. Such performances on his selected criteria could not happen unless the CPS was doing a good job. The implication of the argument was that as the CPS were doing a good job then there was no great need for additional resources (Hansard 2015).

However, the overwhelming evidence from the participants and other sources is that the CPS is failing and is woefully unprepared. There are very likely other factors that have led to the increased number of guilty pleas. In contrast to the Solicitor General, the participants have given several causal factors and explanations of why the guilty rates may have been rising. Thus a potent combination of determinants such as reduction in legal aid, the increase in unrepresented defendants, and the pressure to plead and plead guilty early, may provide a much more plausible account of a rise in the guilty plea rate.

For example, the participants related the increased pressure upon defendants over the past few years to plead early and to plead guilty.

the entire way in which matters aren't now case managed by their very nature put more pressure on a defendant to plead guilty ... you are told as a defendant, the earlier you plead, the more credit you will get... the changes put a greater degree of pressure on individuals to plead. JI

but you do potentially get more vulnerable people, people who shouldn't have been pleading guilty, pleading guilty at an early stage. PD

However, since the parliamentary debate the vaunted guilty plea rate has shown a fall. CPS Inspectors report, for the year 2015-2016, noted a rise in the number of contested cases. In other words the guilty plea rate had fallen (HMCPSI 2016b).

An interesting and convincing explanation of the phenomena of newly rising not guilty rates in the Crown Court is provided by the participants. It relies on a combination of the urge to hurry along the procedure and streamlined disclosure. In the Crown Court this was because of a combination of the new PTPH hearings and the very basic disclosure that the system now required. The idea of the MOJ was to reduce the number of pre-trial hearings held in the Crown Court and thereby speed up the trial process. Hence the PCMH was abandoned and replaced by the PTPH, which was to be held at a slightly later time than the old PCMH. Disclosure was streamlined to reduce the amount of work needed by the CPS.

A participant took this view of the new arrangements.

At the PTPH, nothing is clear. You have a police summary, the occasional witness evidence, no real appreciation of any of the unused material and most of all you have a prosecutor who has not engaged with this case at all so that they will not be willing to compromise at all at this stage[and that]means that more and more first hearings result in not guilty pleas. JJ

Another barrister observed the attitude of the experienced criminal and,

particularly those clients who are used to the old system where they are used to disclosure. They are used to being told by their barrister what the case is. [They] look at you like you are crackers when you say, "I can't really tell you exactly how strong the case is."

Accordingly, in these new circumstances of uncertainty,

some of the defendants will say, 'I am going to wait and see.' PD

The new regime of increased pressure to plead guilty and the PTPH streamlined system has led to a difference between the unsophisticated criminal and the experienced criminal. A barrister expressed his concern thus,

if I have never committed an offence before and I don't really know the system, I don't really know whether I'm guilty or not, I'm the person who's far more likely to panic, enter an early guilty plea, and be laid off at an early stage, rather than the hardbent and cynical criminal who has been through the system many times and knows that if he hangs fire, half the drunks that were witnesses against him won't rock up and the CPS will take a lesser plea on the day of trial. JJ

A slightly different perspective was given by another advocate who noted that,

The more sophisticated offenders are usually the ones with the biggest cases...that face the more serious allegations. They are not simply going to say, well I know I have done it so I am going to plead guilty....you tell me if you can prove I have done it...which is quite understandable from their point of view.PD

As an ironic twist, the new Crown Court systems may have no effect on the hardened criminals apart from enhancing the desire not to plead early. However, the pressure to plead and the more compact timetables may adversely affect the inexperienced and the naïve defendant.

The perverse results of poor CPS disclosure in the magistrates' court are depicted by this story.

So although I gave him advice on the instructions that I had, if I'd had at the least relevant statements at that stage or a summary of them, it may have affected the advice that day but [we seem] to have wasted all that time, got to the trial date, and then had to plead guilty which means wasted public expense in terms of my trial fee, we still get a fee if you plead guilty. But all that time, that court time wasted, all because we didn't get ... the things we should have got initially which were clearly issues raised with the interview of the client anyway at the police station. JU

Thus it transpired that because of inadequate disclosure from the CPS, the lawyer had to proceed on the instructions given by the defendant. Those instructions were to plead not guilty and because of a lack of material the lawyer did not have grounds to give further

advice to the client. A trial date was fixed and when disclosure eventually arrived the lawyer, on the strength of the case now portrayed, had to advise a guilty plea at the commencement of the trial. Good, timely, initial disclosure would have saved that waste and inefficiency.

Another HCA made the following similar observation.

we've got to preserve the position so better disclosure earlier of good quality is going to result in more guilty pleas because if we're presented with strong evidence, we'll be saying to the clients, look this case is strong, the evidence is overwhelming, you will get credit at an early basis for entering a guilty plea at the earliest opportunity, so that assists us in giving that robust advice, whereas if we're presented with a half baked case, we'll say well, at the moment, there looks to be some evidence, I'm not quite sure what the witnesses are saying, I'm not sure if the identification is made out, I don't know if the case is very strong so frankly it's probably worth a try at this stage to see if this evidence comes to fruition and given that the trial's likely to be fixed in two to three weeks... If we we're presented with very good quality evidence early on that's clear then, you know, our job is to tell the client the strength and the quality of the evidence to take his instructions on it. KC

Thus in spite of all the governmental and judicial efforts to produce guilty pleas, and especially early guilty pleas, those efforts may be undone by the poor CPS performance on disclosure.

The CPS is failing on its duties of disclosure, its review of cases, and on liaison with the defence and the police.

Accordingly, the observation in the parliamentary debate by the Solicitor General, that conviction rates and guilty plea rates “clearly demonstrates that there has been an excellent level of pre-trial and pre-plea preparation in terms of case management, which means that the evidence has been presented clearly and that those advising defendants can confidently tender advice in a proper way,” appears to be both hollow and false (Hansard 2015, C226).

The evidence from the participants is that,

the [CPS] are not coping. They are all so demoralised...they really are at breaking point and they just get initiative after initiative after initiative. RF

Without an efficient and properly funded CPS, the rest of the EWCJS will suffer. A lack of resources will force the CPS to shunt costs onto the other agencies. Thus the efficiency of the EWCJS depends upon an efficient and properly funded CPS. Without this efficiency any shortfall in the CPS capacity and efficiency will be shunted to the other agencies resulting in costs to them. But although the agencies in the EWCJS will try and protect their own resources by such cost shunting, the cost must finally come to a rest with its final consumer. Ultimately, it is victims, witnesses, and innocent defendants who bear the failings of the system and the full incidence of the costs.

8.3 PROBATION: NPM IN CONCRETE OPERATION.

8.3.1 Introduction

The second major area where functionality should be under scrutiny is that of Probation, being the body which has been subjected to the fullest NPM management philosophy

including the provision of a 'market' semi privatisation and incentives for the services provided.

There have been real hopes that NPM would bring about a rehabilitation revolution with a reduction in reoffending, the introduction of innovative techniques, and a significant saving of £12 billion to the public purse because of reduced reoffending (PAC 2016a).

The probation *raison d'être* should be brought to the fore. The role of probation is really three fold in the schema of sentencing and its relationship to the courts.

1. Probation has a role before sentencing.

A central role of Probation is providing what are known as Pre Sentence Reports (PSRs). The court, in all but the most straightforward of cases, is likely to ask Probation for a PSR before it determines the appropriate sentence for an offender "Good court work is essential to assist sentencing, to allocate the offender to the right organisation and for effective work to start promptly" (Stacey 2016b, para 10).

2. Supervision of probation and community sentences.

Many defendants, especially in the magistrates' courts, are sentenced to community service. The task of supervision of that sentence falls upon the probation service.

3. Supervision of released prisoners.

At end of sentencing, and in line with the rehabilitation philosophy endorsed by successive governments, prisoners are helped and supervised by the probation service. The initiative of *Transforming Rehabilitation* also brought in a new provision, a 12 month supervision for short sentence prisoners after release. The purpose of this measure was

to reduce reoffending in a group which has a reoffending rate approaching 60% (Open Justice 2016b).

The participants produced three main concerns in their observations on the probation service, a service which they all considered to be hard working and worthy.

8.3.2. Understaffed

Several lawyers, although commenting favourably on the efforts of the probation service, felt that as a service it was understaffed.

Well, the feedback I get from speaking to them is there just isn't enough of them, and they are struggling and under pressure to manage offenders and prepare reports. BC

Again they have had a big shake up recently, were restructured ... and they are incredibly short staffed. KT

This observation has been supported by the reports of the NAO, the PAC, and the Probation Inspectorate.

The National Probation Service (NPS) is woefully under staffed. The original split of 70/30 was based on the anticipated workloads each organisation would get. In reality that is now 50/50 leaving the NPS with a short fall of staff, dealing solely with high and very high risk of harm cases. (Bassett 2016)

However, the CRCs are also under staffing pressure,

As in the Community Rehabilitation Companies, some middle managers felt stretched and were now covering teams across a large area, with reduced

administrative support. They reported that they felt the pressure to meet performance targets at the expense of quality. (Stacey 2016a, p.7)

The result of a combination of pressures brought about by reorganisation and the use of a particular efficiency model, means that both CRCs and the NPS “considered that high workloads have reduced the supervision and training that they receive and the service they provide” (Morse 2016, p.8).

The perverse result of the reorganisation is that the rehabilitation revolution, which demands a close supervision of offenders, cannot come to fruition. The success of a rehabilitation programme, by cutting the reoffending rates, could have a significant direct impact upon the courts. Currently, about 37% of former adult prisoners reoffend (MOJ 2018). Rehabilitation could therefore reduce the work stresses on the courts, reduce the costs of the courts, and, *ceteris paribus*, lead to a reduction in court delays.

This understaffing leads to perfunctory supervision and a lack of supervisory continuity, as expressed by this HCA,

In terms of actually monitoring and providing the service that the probation service should, anecdotally, again, very poor. The number of clients I have, because it comes from multiple sources, “I just go in, I see a different probation officer every time, they don't get who I am, I just tick a box, I am there for five minutes and then I am out again.” BS

The final words can be left to the chief inspector of the probation service, Dame Gladys Stacey, who in her evidence to the Justice Committee of the House of Commons said, “in large part ... staff are more or less overwhelmed by the volume of work that they are trying to do” (Neill 2017, p.5). In her 2017 report she, after noting that some junior staff

have 200 cases, observed that she found it “inexplicable that, under the banner of innovation, these developments were allowed... I question whether the current model for probation can deliver sufficiently well” (Stacey 2017, p.6).

8.3.3. Standard of reports

Two solicitors did believe that, in many ways, the probation service was quicker and more effective because of the court emphasis now on 'stand down' reports. These are quick verbal reports done on the same day requested by the court.

I would say in the past 3-6 months I think probation are more effective now because a lot of the time the magistrates will ask 'Can this report be done today as an oral report or a fast delivery report?' and the answer has been 'Yes.' MG

Instead of doing written reports, what you would expect generally they will give an oral report to court and say spoken to this person and these are the issues identified and this is the sentence, it is quite quick I would say. KT

However, several participants expressed concern as to the quality of some report writing.

So, the people I come accross are well motivated, they work very hard, but I do find the reports are getting worse. HV

In terms of the quality of the reports, I sometimes worry a little bit. There seems to have been a shift...in terms of getting the reports out fine. But the quality of the reports I question sometimes. BS

The Chief Inspector of Probation has put poor report writing down to a combination of “some court staff had not received sufficient training, and lacked confidence in completing the necessary assessments” (Stacey 2016a, p.5).

A vital element in any report undertaken by a Probation Officer is the evaluation of risk that an offender poses, and that vital evaluation of risk is often not adequately conducted. “The mistakes in the reports were often fundamental and involved a poor assessment of the risk that an offender posed. Poor recording of information and missing documentation contributed to poor assessment which included a lack of proper scrutiny about child safeguarding or domestic abuse issues” (Stacey 2016a, p.5).

These defects are fundamental. A court cannot competently decide the appropriate sentence to pass, or the requisite response to a breach of an order, if it is not provided with complete and accurate information regarding the offender and the circumstances of the offence.

8.3.4 12 month supervision

One of the participants expressed great concern about the efficiency and conduct of the new 12 month supervision provision ushered in for prisoners released after short custodial sentences. He linked the poor and perfunctory supervision of such ex-prisoners to understaffing,

I don't think it's helped that they have got this system that you are on licence for a year. That is just nonsense. .. Nothing is happening, that really is the case when I speak to my clients. They are just going in and going out and boxes are being ticked and that is it. Which isn't surprising, because if you want to keep

everybody who's been on licence for a year [on supervision], you are going to need more bloody probation officers. It is as simple as that. Well, I don't think they have had any more. It is just so dishonest. BS

This heartfelt observation is supported by the commentaries of other observers. Epstein, after examining the *Through the Gate Resettlement Service for Short-Term Prisoners Report*, published in October 2016, discerned that “it is clear from this report that the aim that those who served short sentences would be helped and rehabilitated by the provision of one year’s support and supervision, backed with the sanction of recall to prison, is not being realised” (Epstein 2016).

The evidence would seem to be the 12 month supervision is indeed operating merely as a reporting mechanism and that, “it appears that the Community Rehabilitation Companies which are responsible for these services are failing to give priority to this work” (Epstein 2016).

8.3.5 Breaching

This imposition of a market structure and part privatisation occurred despite the appalling record of the MOJ in contracting out of services to the private sector (PAC 2014). The following extract is from an HCA who noticed that breaches of orders were not being actioned by the probation service,

Yes, nobody is being breached on community orders anymore. I haven't seen a breach on a community order for months. MA

The explanation for this new trend was that,

the private part of the probation service that operate the unpaid work get fined as I understand, it costs them to bring the case to court, so far better for them to have second, third, fourth, fifth warning letter to somebody or amend the order, vary the order, rather than bring them back to court. It got to the stage before they were privatised that probation, we entered a not guilty plea to a bit of a weak prosecution, they would drop it because they did not want to pay for council to come and do a trial. ...I don't think I can remember in the last three four months I have seen council prosecuting probation breaches. I think they are unheard of. I might be wrong but that is because of the cost implications. Because the private companies get paid to have that person going through the order, so they are just allowing it to go through. MA

If the observations by MA are correct, then the probation service is deliberately hiding the true state of affairs from those it is contracted to. This is no wonder since research has shown that schemes predicated on price have certain drawbacks and, according to some academics, will always lead to 'gaming' and lying by contractors (Bevan & Hood 2005). Thus, the CRCs will not expose themselves to greater costs by pursuing those who should be breached. It is because matters of cost and results are paramount, that it will not want to show that those under its charge are failing by issuing breach proceedings. Professor Senior, Chair of the Probation Institute, in giving oral evidence to the Justice Committee, pointed out, "you might encourage the non-reporting of minor breaches, in order to keep the figures up and get the payment at the end" (Justice Committee 2017, Q137 p.5).

The observations and explanations proffered by MA- were endorsed by various findings and commentators. Essentially there is a conflict between financial survivability and professional duties, which was admitted by the Probation Inspectorate. Under the system, payments to CRCs are linked to offenders complying with the terms of their sentence and not committing further crimes. But the Inspectorate of Probation found a number of probation officers at CRCs said they had been told by bosses not to recommend to the courts that an offender's community sentence be revoked because their company would incur a financial penalty (Stacey 2016a, p.6; Stacey 2016b, para 8). This activity of gaming in the provision of probation services is obvious and evident. But the MOJ may have a vested interest in pretending that the probation service is merely going through teething troubles. Dame Stacey countered this approach by noting that the teething problems had been largely overcome but that “deep rooted problems now prevail” (Stacey 2017, p.5).

8.4 VIABLE LEGAL PROFESSIONS

The government has made assurances that creating/ensuring a viable legal profession is one of their aims whilst making the EWCJS both more efficient and better value for money. Nearly all criminal courtroom lawyers, whether directly employed by the CPS or through legal aid, receive most of their remuneration from the government. Changes to legal aid will therefore have direct consequences for the barristers and solicitors appearing in the courts, and, quite simply, cuts to fees mean less income for those solicitors and barristers. Sir Bill Jeffrey, (2014), in his report on Independent Advocacy, made the following observations,

The solicitor side of the profession therefore faces a period of upheaval, which will probably involve substantial consolidation and the emergence of fewer, larger criminal legal practices. (Jeffrey 2014, p.60)

His comments regarding the Bar were perhaps less sanguine,

Some of those to whom I have spoken regard the early demise of an independent criminal Bar as virtually a foregone conclusion. Others may be less apocalyptic, but fear that the diminishing amount of the kind of work on which junior barristers have traditionally gained their early experience puts in serious doubt the system's ability to produce the criminal QCs and judges of the future. (Jeffrey 2014, p.60)

The response of the participants in this study were more forthright, and clearly saw the connection between lack of remuneration and an exodus from the criminal bar.

I think also that all these changes [Legal Aid] will have a knock on effect on the Bar because I think you will see fewer and fewer barristers doing this type of work because it just doesn't pay. The fees there now are an absolute pittance and I can't see counsel, especially young counsel, coming into the profession. Those that have been doing it for a long time might still continue doing it but it's not very attractive from a financial point of view with the amount of time they have to put into cases, some cases, the amount of hanging around at court..., they will probably take the view they can make better money in another area of law altogether. And I know there are people ...at the Bar [who] have started to move into different areas because crime just does not pay now. BC

Professor Martin Chalkley, in the Rivlin report (2015) on Criminal Justice, states that between 2007 and 2015 cuts in barrister's fees of an average reduction of 21% in cash terms, equated to 37% in real terms. The Bar Survey 2013-14 reported that income (both current levels of income and uncertainty over future income) was the dominant reason barristers gave for leaving the Bar or for transferring to employed practice, and that the majority of those either leaving the Bar or joining the employed bar were criminal practitioners. The same survey produced some quotes from those leaving the Bar, including in section 8 this telling comment from a criminal barrister. "The continuing pressure on legal aid fees combined with the increased amount of work expected to be completed gratis made it unworkable combined with uncertainty of when cases would be listed and at whose convenience" (Bar Council 2014, p.3).

Because of the lack of remuneration, the advice given by one participant is to,

Specialise in white collar crime not into general crime. MA

This reduction in the skills of advocacy causes great concern for other participants, who comment,

I worry about the future of decent advocacy in the magistrates court and I

can't speak so much for the Crown Court. I worry about it. HV

if you're not attracting young, bright people, erm, the standards of advocacy

will fall and that will no doubt have an impact across the board. KC

The legal aid changes are anticipated to bring about substantial changes to the structure of solicitor practice,

There is not enough work in this city to keep the number of criminal defence practices going. I think in time the supplier base, as a result of natural wastage, will come down. You have only got to look around. There are firms here where solicitors are in their late 50s, 60s, 70s; you see very very few young and upcoming lawyers. BC

The observations of the participants, regarding the dual effects of fee cuts upon entry to the profession, and advocacy standards, have received academic backing. "Cuts to criminal legal aid funding have seen a reduction in expertise and fewer practitioners willing to enter the field" (Byrom & Hodgson 2014, p.4).

The changes in the courts and remuneration have led to a reduction in the vibrancy of the legal profession.

There is not much new blood coming in certainly for the defence advocates perspective. CC

It feels that there isn't that youth coming into it and it doesn't feel like a profession that is vibrant or valued. KC

The reduction in the number of 'white wigs' and young bloods bodes ill for the long term viability of the legal profession. As a consequence of the cumulative changes, morale in the professions is low,

[Morale is] very low, very low. I think everyone feels that they have been shafted by the government with the cuts. Not only the cuts in our fees but now effectively been told that although you are a duty solicitor that qualification does not mean anything anymore. You have paid money, you have ...

experience and gone through a process where in order to get a duty qualification: but that does not count for anything nowadays. So morale is pretty low and some of the smaller firms are thinking 'How are we going to survive?' MG

Morale is a determining facet in courtroom efficiency (Ostrom & Hanson 1999) and must also surely be a major factor in maintaining the number of practitioners. The evidence of the participants supports the prediction of the Manifesto for Justice which stated,

Being a criminal legal aid practitioner is no longer regarded as a viable career path for young professionals. The result will be fewer advocates who are able to prosecute and defend the most serious cases, and the pool of experienced and able practitioners, from whom the next generation of judges is drawn, will evaporate. (Bar Council 2015, p.5)

The diminution in the number of barristers may already have had a damaging effect upon court efficiency. Alison Saunders, the DPP, in her oral evidence to the Public Accounts Committee on the 17th March 2016, said,

At the same time, we know that the criminal Bar, for example, has been shrinking, so we often have difficulty in finding counsel, or counsel will have to return cases late. While the barrister who appears in front of you may only just have picked up that case, it may not always be our fault. (PAC 2016b, p.23)

Thus, the reduction in the number of criminal law barristers has made the courts less efficient. There is difficulty in finding suitable counsel; those who take the cases will,

according to the evidence, receive their briefs late, and *ceteris paribus*, be not as well prepared as they could be.

Government measures seem to have emaciated the legal professions, both the criminal bar and criminal solicitor practices. The shrinkage of advocates in both the Crown Court and the magistrates', with no signs of new budding talent emerging, means that the legal professions are losing viability and, as a result, the courts are bound to become less efficient.

8.5 CONCLUSION

The examination of the three organisations has shown the perverse effects of government efficiency measures. In respect of the CPS there is no comprehensive efficiency programme although there are claims of increased efficiency. There seems to be, instead, a policy of cuts with the CPS proving itself to be understaffed and underfunded and incapable of attaining its functional efficiency.

In respect of the viability of the legal professions, the short term evidence shows marked adverse effects upon the professions and the courts due to the effort to reduce legal aid and the attempt, thereby, to enhance productive efficiency. There seems to be no discernible policy to maintain and ensure the viability of the professions endangered by legal aid cuts. The indicators for the long term existence of viable legal professions appear to be dismal.

In contrast, the government and MOJ have a coherent and thought out policy in respect of probation. The principles underlining these innovations are those of NPM doctrine with its emphasis on efficiency, savings, and the new lifeblood provided by privatised CRCs with their promised innovations and new thinking in the supporting and rehabilitation of

offenders. The idea is that privatised organisations possess the dynamism for progress, whereas state / government organisations are hide bound by their culture and lack of entrepreneurial spirit (Donahue 1989; Burke & Collett 2015). However, the rehabilitation revolution has not occurred. CRCs and the NPS are in various degrees of disarray. Lower morale and staffing problems mean that even basic functions, such as accurately reporting to the court via the medium of PSRs, are not up to standard.

The government pushed through the partial privatisation of the probation service despite warnings from the NAO regarding the wisdom and pitfalls in contracting out services (NAO 2014b).

The combined evidence of the participants, the NAO, the PAC, and the Justice Committee, has shown that the NPM inspired programme has, to put it bluntly, failed.

The nature of the probation reforms may be misplaced. Economists have recognised for some time there may be such things as natural monopolies. In technical parlance, natural monopolies exist because of economies of scale which are significant relative to market demand (Khemani & Shapiro 1993). Probation seems, on the face of it, to be a natural monopoly in the provision of advice to the courts, and also in the provision of support and rehabilitation to offenders. This is not to make a doctrinal stance in the overall academic conflict between the relevant merits of governmental organisations and privatised concerns on the basis of efficiency, allocative or otherwise. It is, quite simply, recognition that in certain markets a competitive model may be appropriate whilst in others a natural monopoly is the obvious choice. The stance is to eschew the dogma of either camp. The evidence so far endorses the view that the competitive market model is perhaps not the appropriate one for probation services.

However, within the throes of the probation reorganisation, there has been a movement from the traditional reintegration of offenders in the community to management of offenders with an emphasis on punishment. The meaning of 'rehabilitation' has now changed and this change has enabled privatisation to take over from the state (Burke & Collett 2015). It is far more than just a structural or organisational change that the rehabilitation revolution has ushered in.

Overall, the governmental measures give the impression of not being consistently thought through. Furthermore, some of the consequences of the measures must now be evident to the government, but there is no noticeable evidence of flexibility in the government's approach in its efficiency programmes.

CHAPTER 9

ALLOCATIVE EFFICIENCY AND THE *RAISON D'ETRE* OF THE JUSTICE SYSTEM

9.1 INTRODUCTION

Technical, productive, and functional efficiencies concern the efficient production of legal services whereas allocative efficiency relates to the distribution of those services. In allocative efficiency elements of fairness and justice have their proper place on how such services should be allocated. It appears somewhat facile for a government to use scarce resources to produce precious legal services and not care how or to whom these services are given. A moral element therefore comes into play and fairness can be accommodated by a Kaldor Hicks adjustment to the Pareto analysis.

This chapter mainly concerns both allocative efficiency and the framework of the legal system itself. Legal services are not produced in a vacuum. There is a *raison d'être* to the production of these services. The main aim of their production is for the attainment of justice which presupposes a fair process. The ingrained fairness of the rule of law is both the aim of the legal endeavour and the framework within which that endeavour takes place. The efficient production of legal services can affect the attainment of justice and the rule of law itself.

9.2 NPM AND ALLOCATIVE EFFICIENCY

Although efficiency is the central element of the government's judicial reform programme, that agenda takes place within the NPM framework. NPM was the theoretical framework for both the New Labour's and post 2010 endorsements of efficiency in the courts.

As already noted, elements of NPM were included as explicit aims in the efficiency programme, including accountability and transparency. Accountability was given a local dimension with the advent of Crime Commissioners, but it is perhaps too early to take a view on the impact that the commissioners will have. At the local level, lay magistrates have a continued, although perhaps diminished role, since, as the use of stipendiary magistrates is expanded, lay numbers are reduced, and morale falls (Gibbs 2016).

Furthermore, “a failure to meet public expectations of fairness, timeliness, and transparency often affects the system's credibility and authority” (Dandurand 2014). However, in respect of accountability and transparency, it is important to note that what may be termed the base of comparisons within the EWCJS has changed.

An example is the practice of undercharging. For instance, grievous bodily harms are charged as actual bodily harms, actual bodily harms are charged as common assaults, robberies as thefts, and, by such devices, we become seemingly a less violent society. The ordinary man in the street is not going to know any different, he will be presented with manipulated statistics, and robberies that should have been charged as such are now thefts. The figures have not become more transparent but rather opaque. The truth is not readily available because the very act of undercharging hides a shift in practice by the CPS and the police. If the CPS says it's a common assault, it is a common assault. It takes the observation by other lawyers and judges to detect and articulate the practice.

It follows that, if such practices are not overt, but hidden by the reallocation of offences to categories of lesser seriousness, then the EWCJS is less transparent. If it is less transparent, it also becomes less accountable. If the man in the street is not aware of the

practice of undercharging and the changes it has wrought, he has no reason to think that officials should be held accountable.

An integral element of NPM is the belief in the efficiency of markets in indicating wants, and the resulting allocation of factors of production via the market to satisfy those wants. The reorganisation and part privatisation of the probation service was the imposition of a 'market' on part of the EWCJS.

The extracts from governmental, MOJ, and HMCT papers and reports do seem to give the impression that NPM type reforms, by adopting methods which will manage government more like a business (Boyne 2002), focus almost entirely on a single dimension of efficiency. NPM reforms “promise to improve productive efficiency by changing *how* public services are delivered” (Andrews & Entwistle 2013, p.10). The single dimension of efficiency envisaged here is that of technical / productive efficiency.

Although NPM is concentrated upon technical and productive efficiency, it is a mistake to believe that the efficiency consequences of adopting NPM doctrines are confined to only technical or productive efficiency. It can be argued that the whole framework of NPM tries to guarantee allocative efficiency and distributive efficiency. The crucial wishes to be decentralised, to be transparent, and to be accountable all hark to the central tenet that NPM must be responsive to the wishes of those who require the goods and services provided by the NPM ordered organisation. It is through this superstructure of NPM that allocative efficiency is secured. Thus, the NPM ordered organisation must be close to the people it is designed to serve; it must be transparent so that the people it serves know what is happening in order to be able to indicate their wishes to the organisation. At page 19 in their article *supra*, Andrews and Entwistle cede the point when they refer to the

observations that, “by bringing the government closer to the people, decentralisation may increase citizen participation, transparency, and the accountability of political processes while reducing the costs of collective action and cooperation”. This accountability should result in a better use of resources, since it both gives the government information as to the true preferences of the public and allows the government to tailor policies to local preferences (Rodriguez-Pose, Tijmstra, & Bwire, 2009).

The problem, however, is how the people indicate their needs and wants to the NPM organisation. In the EWCJS, the government has implemented competitive tendering for the provision of prisons, transportation of prisoners, and a payment by results system for probation services. Some of these systems have failed in their intended operation and results to some extent. A notable example is the tagging fiascos involving G4s and Serco which involved both companies repaying substantial amounts back to the MOJ. In the case of Serco, £68.5 million was repaid after it was revealed that the Companies had charged for tagging persons either dead or in jail (Travis 2013).

Thus, in the absence of a voting system or a viable price mechanism, the wishes of the public must be mediated, or divined, by officials who are presumably in touch with the people. The efficiency and allocation of factors of production will be a function of the skills and strategies of these public sector professionals (Hoggett 2006). “Here, the problem of interpreting and implementing the conflicting and contradictory goals of political principals is inevitably handed down the line to the street-level bureaucrats – like teachers, social workers and police officers – who ‘muddle through’” (Andrews & Entwistle 2013, p.31). The vital decisions are devolved downwards to those who are close

to the people, for example, police officers. They are the interface; they meet the victims, arrest the perpetrators of crime, and often have to make decisions of how to deal with situations. Since 2011, the police have had progressively more powers delegated to them in respect of charging decisions. Specified proceedings are a limited number of criminal charges that the police have responsibility for prosecuting rather than the CPS. The number of specified proceedings has progressively grown and is likely to reach nearly 500,000 per year (Bardens 2014). The aim of these measures was to reduce inefficiency, to speed matters up, reduce man hours for both the police and the CPS, and to 'cut bureaucracy' (Bardens 2014). Fewer cases being reviewed by the CPS and more by the police are seen as an efficiency saving, and the changes should also be viewed as the devolvement of responsibility to the frontline.

The police now have to decide in a larger number of appropriate cases whether to charge, caution, or move to alternative dispute resolution. The whole premise on which this strategy is based is that, not only will the police be in tune with what the public and the victims wish, it will also not have its own agenda which runs counter to the wishes of the people. However, police have other demands upon them apart from attempting to satisfy the wants and needs of the people they serve. Demands from 'above' to fulfil quotas and to reduce crime, in a climate which has led to large reductions in police funding and numbers, must somehow be satisfied. It is, therefore, no wonder that the police have recourse to such devices as 'cuffing', 'nodding', 'skewing' and 'stitching' in order to satisfy their political masters demand that crime is reduced (Patrick 2014). According to a BBC report, Patrick told a Parliamentary Committee,

'cuffing' crimes could involve officers deciding they did not believe complainants, recording multiple incidents in the same area as a single crime or recording thefts as 'lost property', burglaries as 'theft from property' and attempted burglaries as 'criminal damage'. Senior officers might inappropriately delete crimes from the books... 'Nodding' involved collusion between offenders and police officers to improve detection rates,...an offender might admit a number of offences in return for being charged for less serious offences which would result in a reduced sentence, ...the practice of 'skewing' involved forces putting resources into those areas measured by performance indicators. (BBC 2013)

In such circumstances, the mechanism by which NPM is supposed to connect with the people fails and transparency, accountability, and responsiveness are impaired or even non-existent. The very real problem to be faced by advocates of NPM and the politicians at the heads of departments is trying to make the edifice work by ensuring that the 'front line' applies consistent NPM criteria to all situations.

Other 'mechanisms' endorsed in the legal system which give a local voice include the traditional and the new. The latter is the advent of Police and Crime Commissioners which has made, a fundamental shift in the way the police are held accountable (Bowen & Donaghue 2013). The traditional and venerated is the local aspect, as embodied in the magistrates system. However, despite the avowed commitment to decentralise and, thereby, become more in touch with what the locals want, there is an inherent tendency for NPM to centralise. "The particular model of marketisation suggested in the *Transforming Rehabilitation* proposals does, as previously noted, place decision making

firmly at the national level, even if Police and Crime Commissioners are being given more of a consultative role than previously envisaged” (Bowen & Donaghue 2013, p.15).

In practice, therefore, because of failures in devolving to front line officials, and the tendency to centralise, decisions on allocative and distributive efficiency may be determined, not by devolved decisions at the local level, but ultimately by the ‘philosopher kings’ in Whitehall. Despite implementation of 'markets' within the CJS, those markets are imperfect in that those consumers who should ultimately benefit have no purchasing power. It is the officials who decide what to 'buy and 'sell' and, although they will try to adhere to a value for money concept, that value will most likely be in budget least layout terms with quality of the services purchased being a second consideration.

9.3 JUSTICE

9.3.1 Justice and Victims

It was obvious that the PAC, in its questioning and resulting report, had the care of victims in the EWCJS at heart. Meg Hillier, the Chair of the PAC in the oral questioning on the Efficiency of the Criminal Justice System, pointed out that: “we are here to serve justice more widely, but to victims in particular. That is the whole point of the system” (PAC 2016b, p.46).

The PAC were concerned that only 55% of people who have been a witness or victim in court would be prepared to do so again. Those who have experienced the system as a victim are less likely to believe it is effective than those who have not (Wood & Lepanjuuri 2015).

In their subsequent report, the PAC concluded that in the EWCJS,

There is insufficient focus on victims, who face a postcode lottery in their access to justice due to the significant variations in performance in different areas of the country. (Hillier 2016, p.3)

It is very likely that part cause of the apparent lack of care of victims and witnesses in the court room environment, is due to a reduction in the support given to witnesses by the CPS. On February 24th 2014, the *Independent* reported that research, conducted by the Bureau of Investigative Journalism, found that, since 2010, the number of witness care staff has fallen by 57 per cent across England and Wales. It went on to say that, over the previous year, the service was cut by 24 per cent in a year, from 131 people employed in 2012, to just 100 employed in 2013. There were 80 Witness Care Units in January 2012 and approximately 45 in January 2014 (McClenaghan & Wright 2014). The editorial in the same edition made the point.

There are two points here. The first is a matter of practicality. Faced with swingeing reductions in its budget, the CPS has no alternative but to cut back. But this is a false economy. As has long been evident, if witnesses and victims are not supported, they are less likely to attend court – jeopardising trials and wasting the considerable time and money spent bringing the case to court. (Independent Editorial 2014)

This deliberate and marked reduction in witness care is particularly surprising, given that in 2004 the CPS rolled out the 'No Witness No Justice' (NWNJ) programme, whose aim was to reduce the number of failed trials in both the Crown Court and magistrates court resulting from the no show of witnesses and victims. The scheme cost £27 million and

the results of the evaluation were good. It improved CJS working practices and interagency working, and increased witness attendance improved trial outcomes. The evaluation report noted that the scheme had the potential to create a virtuous circle in the CJS (NWNJ 2004).

Furthermore, in the PAC enquiry it came to light that the CPS were to put back into the Crown Courts 350 paralegal staff and managers who had previously been taken out of the courts. The DPP admitted these witness support staff were needed in the courts and that is why she put them back, although she could not enlighten the PAC as to the reasons for the decision to take them out in the first place. The DPP went on to say,

All I can talk about is the decision to put them back into court and to make sure that we are talking to victims and witnesses, because you're quite right: they are at the heart of the system. We can't do our jobs without making sure that we are looking after them. That is what most prosecutors are there for and do their jobs for. (PAC 2016b, p.42)

The actions of the CPS in this area are not impressive. In the light of the NWNJ schemes, it would appear obvious that reducing witness care staff is retrograde and bound to lead to more failed trials, not only shunting the costs onto other parts of the EWCJS, but also increasing loss to the CPS due to wasted effort and resources in failed trials. The hokey cokey of taking witness support staff out of the courts to later put them back in suggests a policy of trying to reduce costs on the hoof, a trial and error approach to see if it works. In the light of the success of NWNJ, and the fact that victims are, according to the DPP, ostensibly 'at the heart of the system,' the recent policies adopted by the CPS reflect an

overwhelming urge to cut costs combined with an overall lack of strategic long term planning.

9.3.2 The Professions and Justice

A solicitor made this astute comment, that,

they [the Government] fail to understand that the efficiency of the court also involves the efficiency of the prosecution and of the defence. BC

The attempt to speed up court processes will be thwarted if, for example, witness care have failed to warn witnesses, the CPS have preferred incorrect charges, and police evidence is incomplete. If the agencies and users of the courts are inefficient, then the business of the courts will be inefficient.

The participants resented the claim that they were 'fat cats' and figures released show that fees for barristers and solicitors show a steady decline over the past ten years (Bar Counsel 2015). Economic pressures have led to some transformation in how solicitors and the CPS do business. Solicitors, hit hard through changes to legal aid fees, were forced to put their own HCAs into the Crown Court to make ends meet. One barrister observed that,

the pressure on solicitors was immense...and the only way they could survive was to use, to convert their in house advocates that had done magistrates cases into the Crown Court....defendants were being represented by people who had none or limited experience in the Crown Court, and certainly limited trial experience. PD

The same practice of firms sending inexperienced solicitors into the Crown Court was also found by Sir Bill Jeffrey. He observed that, “relatively inexperienced solicitor advocates being fielded by their firms (for what were presumed to be commercial reasons) in cases beyond their capability” (Jeffrey 2014, p.22).

The result of economic pressure is that inexperienced HCAs were defending cases which were beyond their competence. As we observed in the findings chapter, participants also testified to the fall in advocacy standards in the magistrates’ court,

The art of mitigation, the art of advocacy is being lost massively, and people are becoming less and less professional because they are being encouraged to do that because the way the system operates. MA

There is much additional evidence to support the proposition that advocacy standards have deteriorated. Mr Justice Green observed in his speech to the International Advocacy Teaching Conference, that there was, “convincing evidence of falling standards. It is of course difficult to measure accurately on any quantitative basis the level of this deterioration but qualitatively the evidence abounds” (Green 2014, p.4).

There seems to be no succour to be gained from improvements in CPS Crown Court advocacy. Standards in the CPS have fallen, and the advocacy gap between Crown Advocates and the independent bar seems to have widened. The CPS inspectorate reporting in 2015 noted.

The gap in ability between Crown Advocates and counsel from the Bar had widened since the first review and the difference in quality between the two was noticeable in a greater number of cases than in 2009. (HMCPSI 2015, p.16)

The competence of advocates has implications for justice in individual cases,

it was not uncommon for advocates (for both the prosecution and the defence) to be operating beyond their level of competence; and that judges frequently felt concern about "inequality of arms" between prosecution and defence if one side or the other was inadequately represented. (Jeffrey 2014, p.22)

Thus, there is strong evidence that the economic squeeze upon the legal professions (and the CPS) has resulted in a reduction in advocacy standards as economic necessity forces the inexperienced into the front line of combative advocacy. Neither victims nor defendants are well served under such an impecunious system. Poor advocacy can lead to injustice.

Effective advocacy is at the heart of our adversarial system of criminal justice. If prosecution and defence cases are not clearly made and skilfully challenged, injustice can and does result. Effective advocates simplify rather than complicate; can see the wood from the trees and enable others to do so; and thereby can contribute to just outcomes, and save court time and public money. (Jeffrey 2014, p.3)

The result of the implied 'inequality of arms' is injustice, due to either incompetent defence or inept prosecution. The thesis findings suggest falling advocacy standards, which correspondingly worried the participants. Falling standards means that a court is not being fully appraised of the complete nature of a case it is being asked to adjudicate on. Furthermore, the argument regarding falling standards and its implications for justice, has also been linked to a more fundamental theme,

But the publicly funded market [for court advocates] is at the epicentre of the rule of law and is crucially important to the vibrancy of our democracy. It exists to protect civil liberties and the rights of the individual against the State. This is particularly so in the Youth Court, the Magistrates Court, the Crown Court. (Green 2015, p.3)

Mr Justice Green concluded,

If the “perils” that I have identified of falling standards perpetuate then, there can really be no shadow of a doubt, the due administration of justice, and the rule of law, is threatened. (Green 2014, p.17)

These last two observations may not be hyperbole. Many of the practical and essential elements of the rule of law, such as equal access by individuals to the law, are under threat.

9.3.3 Justice and Legal Aid

Legal aid has already been addressed in the section regarding delays, so this section will focus on the effects on justice which the changes have led to. Solicitors felt that unrepresented defendants, many of whom were not very articulate, suffered because of non-representation.

This solicitor elaborated on the unjust consequences that he has witnessed arise from such arrangements,

And that is happening on a very frequent basis, and we have to remember that a lot of these people, not all of them, are not articulate. They can't put before the court the issues or factors which are relevant to their case in terms of

mitigation or whether issues in a trial. You have got to remember that you can't simply get legal aid because you are pleading 'not guilty.' So I know a lot of road traffic offences...a lot of breach proceedings, where we think they are not going to get legal aid, they go in by themselves and end up admitting offences where, personally I don't think they should. BC

The observation has strong academic backing, for, “as procedures and rules become more complex, accused persons increasingly need representation in order to understand their situation and rights and to resist the pressure to plead guilty” (Byrom & Hodgson 2014, p.4).

A magistrate, Christopher S Morley, quoted by Gibbs, reportedly summed up the unfairness very succinctly,

At the heart of the adversarial system is the concept of “equality of arms”, with both sides being equally able to present their case. This has been so seriously undermined by the lack of access to legal aid that it has become a regular and disquieting feature of the magistrates’ court to find defendants attempting to respond to a charge they don’t fully understand, with no experience of the law or of legal procedures, against qualified professionals with all the resources of the CPS behind them. (Gibbs 2016)

The government has justified the changes in legal aid so that it is targeted for those most in need of it, specifically, those who may be in real danger of receiving a custodial sentence if found guilty. However, the consequences, even when custody is out of the question, can be profound.

The consequences of even a very minor matter (e.g. fine and demerit point loss) can be significant for an accused, and can end up indirectly costing the community much more than is saved by denying funding that might lead to licence retention. (Buchanan, Fatouras, Lasry, Spencer, & Norton, 2014, p.8)

The no adjournment culture, combined with non-representation of the accused, could have the following effect that the pressure to clear cases could force magistrates to focus on resolving cases quickly, rather than taking the time to ensure a just outcome (Buchanan, et al. 2014).

The overall combination of a determination to eradicate delay, a no adjournment culture, and strict restrictions of legal aid eligibility, may have dire long term consequences, as observed,

A genuine concern exists within the legal sector that ill-considered, quick-fix resource and policy restrictions in the area of legal aid, combined with punitive law and order agendas, will damage fundamental understandings of due process and the rule of law. (Flynn 2014, p.12)

9.3.4 Justice and Delay

The central theme of the government's justice programme was the eradication of delay, partly because delay was seen as a hallmark of judicial inefficiency, but also because delay was equated with injustice. The findings of this research, however, strongly suggest that the efforts to speed up the judicial process have had consequences for the attainment of justice. The no adjournment culture and increased tempo of the magistrates' court, combined with a lack of CPS resources, resulted in ill prepared prosecution cases being thrown out of court when they were otherwise viable. "It was also noted under these

speedy justice alterations that pressures not to adjourn cases except when absolutely necessary mean some defendants are able to 'walk away' without the case against them being presented" (Ward 2017, p.26).

Despite the good fortune of having prosecution cases stilled for formal defects, the defence were also victims of the combination of no adjournment culture and lack of CPS resources. The no adjournment culture was married to a desire by the courts to gain early pleas, and also guilty pleas. Late and inadequate disclosure meant advice given to defendants was sometimes inadequate. Legal aid changes meant a growth in the number of unrepresented defendants, some of whom, it was felt, wrongly pleaded guilty.

The result could be called a double whammy against justice. Victims are not having their cases heard because of prosecution failings or by inappropriate diversion. Victims are also being short changed because of CPS undercharging.

The no adjournment culture was also judged deleterious to the defence. Pressure in the courts against defendants, combined with unrepresented defendants, was thought to result in injustices.

It is a fundamental category mistake to believe that the choice is between two similar goods and services, namely expedition and justice. It is not. To conflate the two different kinds of concepts will only lead to confusion and poor decision making. In thinking that delay is injustice is to commit a cardinal category mistake (Ryle 1984). The relationship between delay and justice is a factually contingent one, not one of conceptual necessity.

Our legislators have to be aware of the damage that poor administrative decisions can have on the fabric of the CJS, the resulting damage to the rule of law, and the maintenance of justice and fair process. Only when that perspective has been reached

can properly informed decisions be made. In believing that justice can only be pursued by reducing delay, the administrators have become blind. In pursuing greater efficiency they are oblivious to the damage they have done to justice.

It is the deliberate equating of no delay with justice that has constricted and deformed government action in its efficiency drive. It is easy and comforting to believe that in eradicating delay we are also, automatically, attaining justice. However, the findings overwhelmingly suggest that the measures to speed up justice have, in reality, injured justice for both victims and defendants.

The following very experienced solicitor, although admitting the WPSS maxim that justice delayed is justice denied, made this telling observation,

[The courts emphasise] speed of disposal over thoroughness, and even over the need to observe the... rules of law, which are regularly ignored, but also rules of justice which, of course, are more difficult to spell out. It seems to me a headlong rush towards saving money and the excuse is being used to expedite justice, and I recognise the need to expedite justice, justice delayed is justice denied, I accept that, but you can take it too far. HV

9.4 TRANSFORMING THE CJS: STRATEGY AND ACTION PLAN 2013

The brave new world as envisaged by the authors of the TCJS has not come to pass. The government's most important outcome is for crime rates to fall, and this hoped for fall means the public have been better protected. The relationship between the fall in crime and the protection of the public is not spelt out. But if crime had fallen then, *ipso facto*, there is a natural conclusion that the public have been better protected from the ravages of criminal activity.

TCJS has enshrined a rather simplistic view of the causes of criminal activity. Furthermore, governments are quick to claim responsibility and boast the wisdom of their policies when crime is shown to be falling, and ready to point to extraneous factors outside governmental control if crime rates are rising. Thus, for example, the fall in the crime rate was trumpeted in a press release of 23 January 2014, in which “police recorded crime and the Crime Survey for England and Wales – show overall crime has fallen by more than 10% under this [Coalition] government” (Baker 2014). Although crime rates, based on the CSEW, have fallen since 1995 (ONS 2017) there are signs that crime may now be entering an upward trend (Morris 2015a) with a genuine increase in some crime types (ONS 2017).

One causal link has been endorsed by the government, namely the link between rehabilitation, reoffending, and crime rates (Grayling 2013). Quite simply, effective rehabilitation will lead to less reoffending, and that will reduce the rate of crime. It is clear that, despite avowed government efforts, the rate of reoffending has remained stubbornly high. Indeed, the rate of reoffending has remained fairly flat, fluctuating only between 25% and 27% since 2004 (MOJ 2017a, p.3)

In contrast to the near demise of rehabilitation in the US, rehabilitation is the essential and major element of the EWCJS strategy to reduce reoffending. Rehabilitation is seen as the key to reducing reoffending. However, observers may take the view that the reported difficulties in some UK prisons has not helped in the process of rehabilitating prisoners. Furthermore, as already noted, the reorganisation of the probation service has not gone as well as it was perhaps hoped.

As noted in section 2 of chapter 4, the government recognised that the attainment of its seven outcomes was dependent upon the EWCJS becoming more efficient. The findings

are that the EWCJS system does not seem to be more efficient and, in this time of austerity, any necessary resource wherewithal for the attainment of the outcomes is lacking.

9.5 RULE OF LAW

The concept rule of law has been enlisted by both the government and its critics on the debates in respect of the EWCJS. The concept includes a family of interrelated sub concepts and, in one form or another, the concept can be traced back beyond medieval times to the ideas of Greek philosophers (Aristotle, Politics 3.16).

The threat to the rule of law by one participant was explained as follows,

If law is seen as simply a political geegaw, that the criminal justice system can be pushed, manipulated, twisted and turned, and reduced to a financial nothingness by politicians, then that is no longer the rule of the law, it is the rule of man. It's as simple as that. The legal system needs to be able to have a certain independence from governments. And I do see that under threat. JJ

The central tenet is that law, as opposed to the whims of rulers, should govern nations.

Dicey gave the classic formulation in his *Introduction to the Study of the Law of the Constitution* (1885). His position is summed up in the following propositions. Firstly, that no man is to suffer punishment other than by breach of the law. Secondly, no man is above the law and the law applies equally to all subjects. Furthermore, rights and liberties are secure because a subject can go to the courts to remedy any breach of rights and liberties. Taking a more modern perspective, Tom Bingham, in his book *The Rule of Law*, gave eight principles of which three are fundamental to our discussion.

The law must be accessible;

Laws should apply equally to all;

The adjudicative procedures provided by the state should be fair.

Every Lord Chancellor since 2010 has verbally enshrined the importance of the rule of law. “The rule of law is the most precious asset of any civilised society. It is the rule of law which protects the weak from the assault of the strong; which safeguards... and which guarantees the essential liberty that allows us all as individuals to flourish” (Gove 2015). He went on to relate that sadly we now had two nations in the justice system.

The stance was heavily criticised. Lord Falconer, the then shadow justice secretary, was reported in the *Guardian* as saying “People will be bemused by the sight of the justice secretary complaining of a two nation justice system. Since the Tories took office, access to justice has been all but dismantled for the poorest in our society.” In the same vein, the Oxford academic, Wilmot-Smith, responded with incredulity by exclaiming that “this, from a minister in a government that has made enormous cuts to legal aid, is a little like Orestes asking for mercy on account of his being an orphan” (Wilmot-Smith 2015).

Fundamentally, government policies have had a direct and adverse effect upon the rule of law. The policies, as discerned by the participants, have led to a reduced accessibility of justice from the courts. Reduction in legal aid, with a no adjournment culture, pressure for early guilty pleas, and the growth of unrepresented defendants mean a reduced accessibility to court justice. Fairness of the procedure to some defendants and some victims is diminished. Cases thrown out of court because of the combination of a no adjournment culture and a lack of preparation by the CPS due to resources, is basic unfairness to a victim who may have done everything asked of him. In the magistrates’

court, late, incomplete disclosure, and a lack of legal advice, may lead to unrepresented defendants wrongly pleading guilty. Accordingly, the law does not equally apply to all. The well off will be able to afford good and consistent legal advice and representation and not be reliant upon the services of a harassed duty court solicitor.

Such policies, as discerned by the participants, whose observations are markedly supported by Parliamentary committees, the NAO, the Bar Council and the Law Society, mean that there is increased inaccessibility to the justice of the courts. Indeed, the inaccessibility to the courts and justice for some had already been admitted by Gove by his reference to 'two legal nations' in his inauguration speech, *supra*.

The President of the Supreme Court, Lord Neuberger, has argued that conceptually, without justice there is no rule of law (Neuberger 2013). The ideas of justice and fairness underpin rule of law. The insistence of the concept on like treatment for all, and the universal applicability of law and not capriciousness, is the embodiment of justice. "It is fundamentally based on the rule of law, and it is therefore essential that all its citizens have fair and equal access to justice" (Neuberger 2013, p.9).

There is little doubt that austerity damages the rule of law. "Given the fundamental importance of the rule of law as discussed... I would suggest that any proposed cost-cutting in that area should be scrutinised particularly carefully" (Neuberger 2013, p.13). The rule of law is also a precondition of a democracy and fundamental in "that it is essential for any modern civilized democratic country to have the rule of law [and] cutting the amount available for the courts risks increasing delays and decreasing the quality of justice " (Neuberger 2013, p.13). What is important to realise is that there can be no straightforward Pareto trade-off between the rule of law and austerity. One cannot argue that we have to surrender a little less justice to obtain a saving of several million pounds from the ministry budget. The response to such

a publicised hypothetical proposal in those terms by a government would be public outrage that a government would even contemplate a reduction in the scope and applicability of justice. The Rt. Hon. Sir Ernest Ryder, Senior President of Tribunals, in a lecture in 2016 made the following observation. “The point about ‘austerity’ is this. What is right, is right; what is fair, is fair; and what is just, is just. Justice has no second class: even in an age of austerity” (Ryder 2016, p.2).

The government have, however, highlighted a fundamental point. That inefficiency and delay of the judicial process reduces accessibility to the courts, and *ipso facto*, damages the working of the rule of law. But the policies induced by governmental action may not only have been ineffective in reducing delay, but have actually led to increased delay, produced less accessibility, and created greater injustice. We are still in an era of targets and government measurements of policy effects. It would be hard, if not impossible, to quantify the consequent damage done by austerity to the rule of law; nevertheless, participants and commentators agree that the damage to the rule of law by austerity is palpable and real.

CHAPTER 10

CONCLUSION

The four research questions have been tackled, addressed, and examined. Firstly, the concepts of efficiency adopted, explicitly and implicitly, by post 2010 governments in the efficiency drive in the English courts and the EWCJS are technical, productive, Schumpeter, and allocative.

Secondly, the efficiency measures adopted by those governments were centred into the following groupings. Reducing delay and 'getting it right first time' were focussed upon technical and productive efficiency. The next set of measures mainly aimed at reducing costs, and therefore increasing productive efficiency. Hence the measures on legal aid, the closure and selling off of court buildings, staff reductions, the reducing of CPS and police budgets, and the supposed market efficiency of semi privatised probation. The Schumpeter efficiency measures have at their heart the hoped for IT and digital revolutions.

Thirdly, allocative efficiency is purportedly assured by putting into play policies that revolve about the hub of transparency and accountability, these dual concepts, together with probation privatisation, being the main theoretical and practical contributions made to the efficiency programmes by NPM.

Finally, the effectiveness and success of these efficiency programmes has been shown to be disappointing.

The research findings suggest many further areas that can be fruitfully researched in legal systems. These range from the macro in scope to the micro. On the macro level a

productive study could be the evaluation of organisations by a range of efficiency concepts with FE at its core. Furthermore, a project which explores how organisational measures can help avoid cost shunting would be noteworthy. In addition, the findings suggest that a comprehensive study on how cuts in the provision of legal aid may affect the efficiency of court procedures would be both feasible and worthwhile.

On the micro level, among the many interesting undertakings that can be proposed, are the nature and extent of undercharging, and the allied topic of police and CPS liaison.

Despite the critique, in many ways the overall ideas of the government(s) post 2010 are to be admired. They have rightly realised the problems that stem from the silo mentality. However, the findings depict a EWCJS that falls far short of the system that is aspired to in the various governmental and ministerial documents. The evidence of the NAO and the PAC on the efficiency of the criminal courts gives substantial backing to the evidence of the participants. The EWCJS is inefficient, and the various agencies of the EWCJS, because of a lack of resources, shunt their costs onto other agencies. It is further suggested by the participants, that the agencies indulge in such practices as undercharging and voluntary interviews which hide the true nature of the changes wrought by austerity funding. The government has failed on its own success criteria, with its reduction of court delay times in the Crown Court to be at best indifferent and its 'getting it right first time' to be an abject failure. Even the weak governmental wish of wanting viable legal professions appears superficial in the light of EWCJS instability. The deliberations have brought forward the new concept of FE, which puts into context the limitations of relying on technical and productive improvements without enough resources to attain organisational function. Even the implicit NPM aims, and its basic function of allocative

efficiency, are not achieved. The findings suggest that practices, such as undercharging, ensure that accountability and transparency in the EWCJS are greatly diminished.

One agency plays the main pivotal role in the running of the EWCJS. The CPS has been correctly described as the weakest part of the EWCJS. Lord Leveson reminded the government that there is an irreducible core minimum of funding below which services cannot be delivered. That point has perhaps been reached, and the plea by Lord Leveson for extra CPS funds has not been met.

Mr Heaton with his assertion that the MOJ had attained the same output for less expenditure is central to the efficiency debate. What he has asserted is a bean counting fallacy; an assumption that the new beans are the same quality as the old. As stipulated in the definitions of productive and technical efficiency, the quality of output must not fall as a result of the efficiency measures. Although we may have a cheaper EWCJS than 2010, that system has changed dramatically with an overall adverse change in the quality of the output. The efficiency measures have produced perverse results for efficiency and undesirable effect on justice and the rule of law. There is missing a careful ministerial quality control monitoring of the output of the EWCJS and a fixation on the production of more beans for less money. The government and MOJ's ideas on efficiency are somewhat superficial and without a more holistic approach the narrow technical / productive efficiency measures applied to the courts are bound to lead to perverse consequences. A realistic schema for the evaluation of governmental efficiency measures should, *inter alia*, be based upon the idea of the FE of the EWCJS constituent agencies. It is suggested that the greater the FE of individual agencies, the less the need for cost shunting between agencies.

The EWCJS plight is made clear after the forensic questioning of witnesses by the PAC, who have come to the unsettling conclusion that,

The criminal justice system is close to breaking point. Lack of shared accountability and resource pressures mean that costs are being shunted from one part of the system to another and the system suffers from too many delays and inefficiencies. There is insufficient focus on victims, who face a postcode lottery in their access to justice due to the significant variations in performance in different areas of the country. The system is already overstretched and we consider that the Ministry of Justice has exhausted the scope to make more cuts without further detriment to performance. (Hillier 2016, p.3)

This conclusion neatly sums up the situation. The warnings of the legal professions seem to have been born out. It is of no use whatsoever to have a plan that incorporates so many good and insightful ideas, such as overcoming the silo mentality and encouraging the agencies of the EWCJS to work together, unless the basic resources to ensure functional efficiency are provided. Unless that minimum is provided, the hard work and efforts of so many trying to make the system work will come to nothing. Actually, the consequences are worse than that. The masking of the inherent faults of the system by adopting new initiatives, gives the illusion of progress, whilst in reality producing perverse consequences. Each agency adopting new initiatives may improve technical efficiency in the short run for that particular agency, but because there is a lack of overall resources within the EWCJS, the reality will be for one agency to shunt work and costs onto its neighbour. The merry-go-round will continue, despite any cooperation between heads of

agencies in the CJB, quite simply because those officials dealing with day to day work with little time and fewer resources, will always try and shift the costs onto other agencies as a basic survival tactic.

From a Pareto efficiency standpoint, the government and the MOJ seem to be making a multitude of Pareto type decisions; introducing new procedures, new technologies, and making changes in legal aid, both in terms of fees and eligibility. The MOJ's hope is that the new technology and better working practices will move the PPF away from the origin, therefore giving the possibility of making everyone better off.

The thesis findings, and the evidence from other quarters including the PAC, indicate that there has been a failure in achieving a Pareto improvement. In fact, the EWCJS seems to be creaking throughout its structure, with multiple examples of inefficiency, delay, and injustice.

It is perhaps in the area of achieving justice that the system has its greatest failings. The findings strongly suggest that the measures implemented have had deleterious effects on justice, for both victims and defendants. Such injustices have been noted by participants, practitioners, academics, and parliamentary committees, but seem to be ignored by the agencies entrusted to decide upon and implement justice policies.

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15.pdf

Appendices

Appendix A: Allocative Efficiency

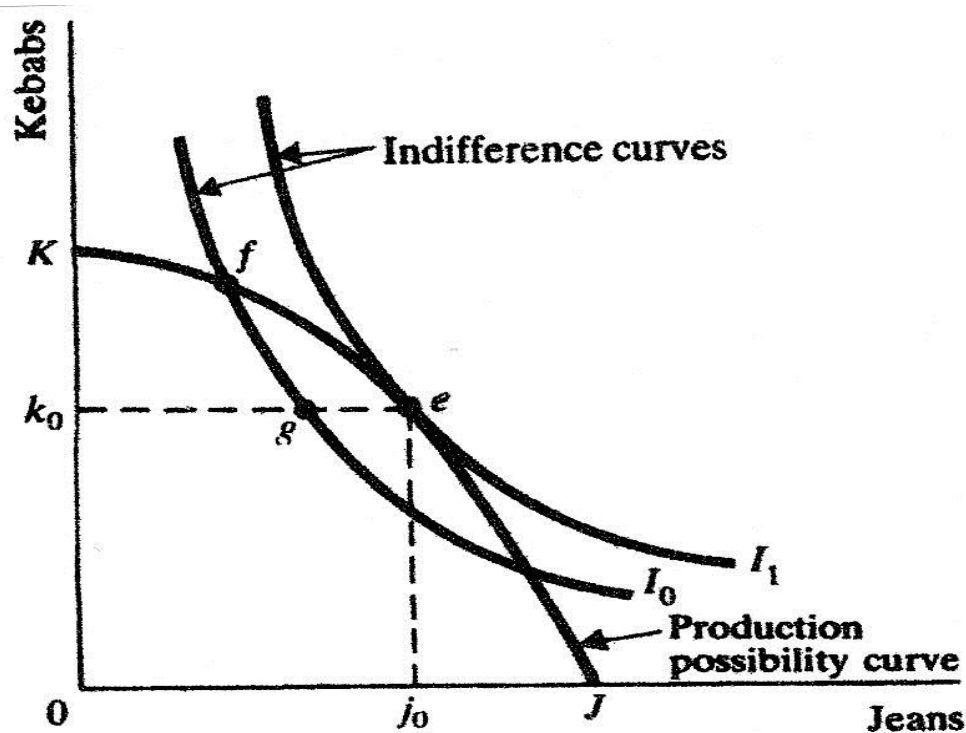


Diagram from Lipsey's First Principles of Economics (Lipsey and Harbury 1992, p.223)

Productive efficiency occurs at all points on the curve KJ .

Full economic and allocative efficiency occurs only at e , where the slope of the production possibility curve (PPC) equals that of the indifference curve I_1 . Point e is the only part of the indifference curve that can be satisfied by that production possibility curve (PPC).

Thus allocative efficiency depends upon a combination of technical efficiency (position of the PPC) and the wants of the consumer as shown by the consumer indifference curve.

It is the communication of those wants that is at the heart of effective allocative efficiency.

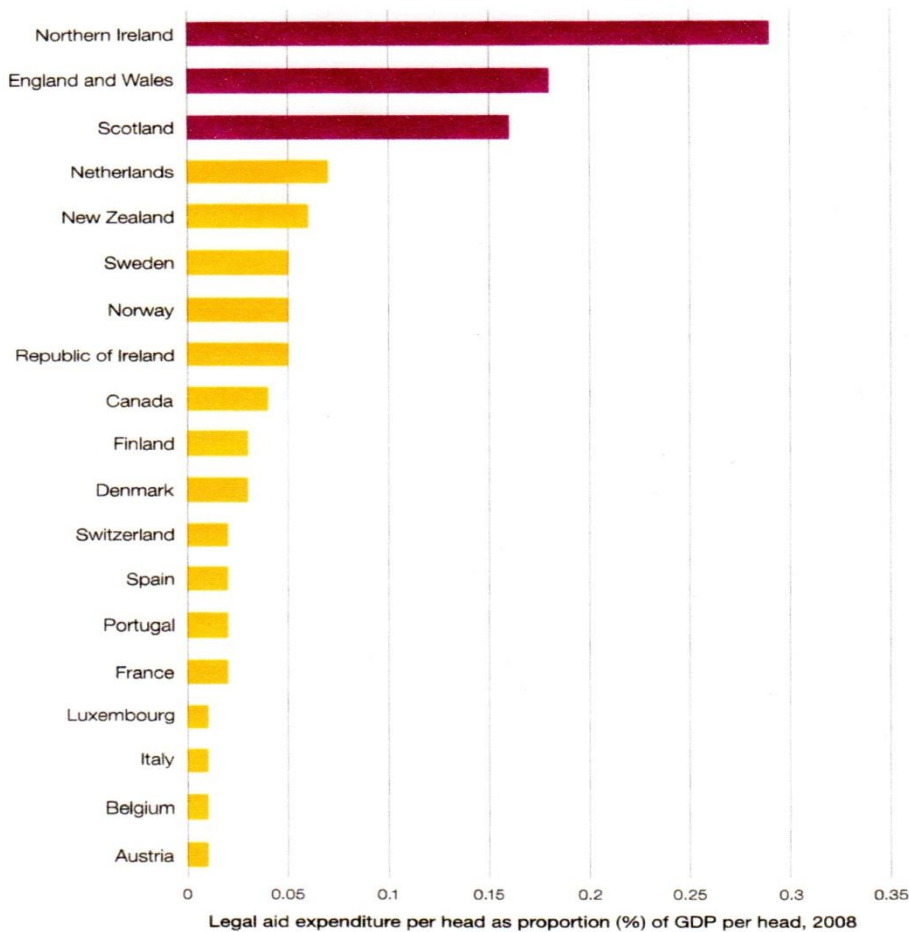
If, for example, the consumers of legal services lack an effective mechanism to communicate their needs and wants to the government or the MOJ then allocative efficiency cannot be effective.

Appendix B: Legal Aid Spending Per Capita

8 Part Three The Performance of the Ministry of Justice 2012-2013

Figure 8

Legal aid expenditure per head as a proportion of GDP per head, 2008

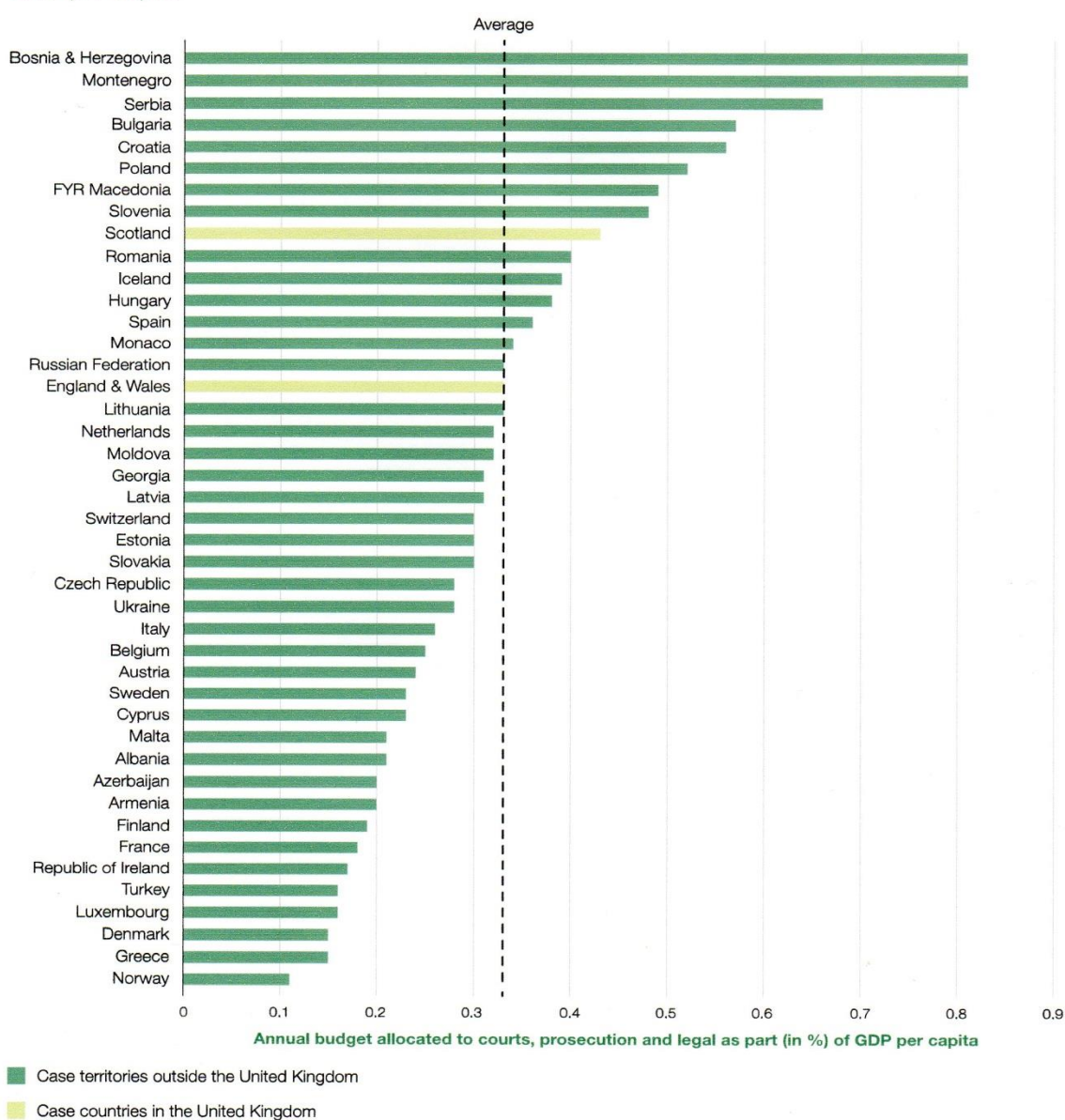


Source: Ministry of Justice, International Comparisons of Public Expenditure on Legally Aided Services: ad hoc statistics note, 2011, Table 2, p.3

Appendix C: annual public budget allocated to courts, prosecution and legal aid per capita.

Figure 19

Total annual public budget allocated to all courts, prosecution and legal aid as a percentage of GDP per capita



Source: European Commission for the Efficiency of Justice (CEPEJ), *European judicial systems*, (2010, showing 2008 data), p.42

Appendix D: The Stress between Criminalisation and Streamlining the CJS.

There may be a political need to criminalise: to extend the scope and depth of criminal law which will, in turn, increase the number of offences and potential criminal offenders.

The political urge to criminalise, and increase the number of offences, places an additional strain on the CJS in a time of austerity. The urge to streamline and the drive for efficiency are therefore often at odds with the widening scope of the CJS.

The urge to criminalise reached its peak under New Labour. For example, between 1997 and 2006 a new criminal offence was created almost every day (Pantazis 2008).

The following extract from an electronic article puts the criminalisation of the young into historical context.

In the throes of a government that has legislated in this area [young people] more in the past decade than in the whole of the previous century, the idea of criminalisation has begun to take a firmer hold in some sections of the popular, media, and political imagination. (Muncie 2008)

Criminalising increases the number of statutes and case law and generally increases volume and the complexity of the criminal law. It increases the number of potential offences and offenders. Such growth is, in part, a response to changes in populist moods (Pantazis 2008).

The need for criminalisation has been summed up as follows.

Quite simply there are votes to be lost advocating the expansion of the welfare state, and welfarist approaches to the treatment of offenders, but votes to be won by advocating the punitive treatment of those variously labelled criminal or anti-social. (Rodger 2008)

Not all pieces of legislation or instances of judge made law complicate matters. For example, the Fraud Act 2006 simplified dishonesty offences and removed much of the

lacuna surrounding dishonesty mens rea. Furthermore, there has, since the demise of New Labour, been retrenchment of some measures adopted in that era. For example indeterminate sentences are now frowned upon and the heady growth in new criminal offences has dramatically slowed. Nevertheless, it may be argued that all governments have the wish or need to curry populist moods and endorse measures for the winning of votes by endorsing selective criminalisation.

This political need to criminalise produces great tension with moves to streamline, make more efficient, or simply reduce resources used by the CJS. It was this tension Leveson was referring to when he remarked of legislation overload in this time of austerity (2015). The natural response to these concerns is to claim that the procedural efficiencies inaugurated by the streamlining actually make the system better organised and hence the increased number of offences and potential offenders can be more easily managed. Such thinking has been at the hub of the government(s) strategy for the CJS since 2010 and it is that strategy which is, in part, the subject of this thesis.

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social-policy

Appendix E: Lawyer Professional Identity

Allied to the difficulties presented by the influences of vested interests in participant response is the real effect of professional identity. The evaluation of a participant's views could also be hampered by the nexus of professional identity and the culture it bestows. Lawyers may have a sense of professional identity that determines to an extent what they think about and a view of what a lawyer should say and do. The danger being that the sense of professional identity and its associated culture may 'colour' the perceptions of the participants and reduce their objectivity. There is, for example, the ever present danger of 'partisan bias' with professionals, especially lawyers, identifying with their client's cause and thereby having a distorted perception of situations and lacking overall objectivity (Perlman 2015).

Research by Bliss in respect of Harvard educated lawyers has led to the establishment of two main concepts of lawyer professional identity, the 'thin' and the 'thick'.

The standard conception of lawyer identity is that it requires "thin professional identity," whereby lawyers bifurcate between personal values and professional behavior in accordance with a client-centered principle of neutral partisanship. Defenders of the standard conception emphasize that it is necessary to avoid role confusion and paternalism in interactions with clients. It is important to note that within this line of thinking, scholars often stress that thin professional identity need not be alienating, as lawyers can take pride in providing client-service without individual moral screening. (Bliss 2016, p.2)

A thick account takes the view that 'lawyers should be public professionals, officers of the court, purposivists, and lawyer-statesman—not amoral technicians' (Bliss 2016, p.2).

In the 'thin' identity mode lawyers may distance themselves from their professional identity. This role distancing behaviour is undertaken by the occupant of a role with the intent of communicating to others that the individual's actions should be attributed to the role rather than to the individual (Goffman 1961). Research has shown that lawyers, when employed in activities they may find fraudulent and distasteful, may indulge in distancing themselves from their professional identity. This behaviour may be prevalent with lawyers who are employed in large corporate law firms (Bliss 2016).

However, for arguments in respect of lawyer partisan bias to have purchase, there must be an assumption of a state of objectivity / impartiality which the now biased lawyer has derogated from.

Thus the professional identity /cultural arguments are double edged. The formal professional culture and education of, say, lawyers and auditors, place great stress on objectivity and impartiality. Furthermore, such fundamental principles are reinforced by codes of ethics and programmes of CPD. Indeed, it is **when** lawyers and auditors stray from their formal culture of professional codes that objectivity and implied impartiality are lost. It is when that happens and the professionals indulge in 'partisan bias' that the results can be narrow minded prejudice and unethical practices (Bamber and Iyer 2005).

In other words, the formal culture of lawyers helps to support an objective and impartial view of the world. The substantive culture, however, through misplaced loyalty to client and the corporate law firm's objectives, may lead to clear partisan bias.

Thus in Perlman's research findings, it is when the lawyer moves into a particular sub culture of the legal profession that they become susceptible to strong partisan bias. This is not a result of being a lawyer *per se*. The work of Bliss seems to reinforce this view. Many lawyers distance their 'true' selves from the work they have to do. However, for many lawyers there is an overlap between their view of being a lawyer and their morality. For the designated 'thick' lawyers there is a commitment to being officers of the court and lawyer statesmen with adherence to objectivity and impartiality.

On the one hand there is the professional identity a lawyer adopts towards a client and then also the identity a lawyer adopts towards a researcher. However, if it is accepted that a lawyer might have a thin identity in dealing with a client he may thicken it up in talking to an outsider about his cases because he feels the cultural pressure to defend a higher ethical identity to an outsider. In fact there can be at least three scenarios in which a lawyer might adjust his stance on the thin/thick scale - discussing the case with the client, discussing it with colleagues in chambers, discussing it with an outsider.

Because of the professional identity issues there was, accordingly, a great emphasis upon reflection and reflexivity in the methodology. The participants in the study displayed a range of identities from strictly 'thin' to the established 'thick'. All participants, even those who took on the mantle of the 'thin' amoral technician, could stand outside the client bias milieu. Thus in the findings many participants, despite obtaining a 'good' result for their client, volunteered the view that often such a result was not right in a moral sense. This was particularly the case when the prosecution had, through its own incompetence or other failings, withdrawn from the court potentially very good cases. The common view was that, although the defence advocate had fulfilled their duty to the

client, such results were, from a wider perspective, unjust. In fact the moral aspect was uppermost for some who displayed what may be termed a 'thick' professional identity.

Only two participants displayed some partisan bias.

Another example of this 'objectivity' and impartiality was the participants' damning reports of disclosure failures. A patient and a thorough reflection upon their answers led to the conclusions that their accounts were plausible, their reports consistent, and there was an apparent absence of bias.

There seemed to be no reason to reject claims of late or even non-existent disclosure. By reflexivity I examined my own motives and attitudes trying to discern misplaced empathy, bias, and naivety. The process did not cease with reflection and reflexivity. The answers were examined in the light of evidence from other sources and a great deal of confirmatory data found which substantiated the positions of the participants. Indeed, the external and 'independent' sources were at least as damning as the participants' views in respect of disclosure performance.

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Appendix F: Original Interview schedule

Explanation of the interview, its purpose, how it fits into the research aims, and how it will be conducted.

Permission sought for use recording device.

Check that consent form completed.

Any questions?

1. Tell me about yourself:

education

years call

specialism

age range

Work split: crown court / magistrates

(coded: reason for asking questions,)

The information in this section will not be used so that the participants can be identified, but may have a use in showing, for example, that attitudes towards certain issues may vary, depending upon the experience or specialism of the participant.

Emphasis to be on the semi structured format, and with this topic in particular to 'keep open' the way the research may develop. I must emphasise the 'qualitative and illustrative' nature of the research, and the fact that certainly the work has the potential to 'snowball,' in other words the participants may indeed have a great deal to say on all these questions.

2. What changes have you observed in the courts over the past few years?

3. What do you know about the latest reforms to the criminal courts?
4. Do you think the reforms have made the courts more efficient?

Some variants of the following questions may be used as prompts if required.

5. In the light of (4) have you noticed any deliberate policies or measures to improve efficiency?
6. In the light of (4) are the courts becoming more or less efficient?
7. In the light of (4) have you noticed any economies in the court system?
8. What impact if any, have the economies had on efficiency?
9. What impact, if any, have the economies had upon fair process?

Prompt Topics

Swift and Sure

Get rid of delay

EGP

Committals

Volume of work

Retain more cases in the magistrates' court

Ct Closures

TSJ... Disclosure

Liaison

Seamless, early liaison, streamlined disclosure.

CPS disclosure etc

Digital courtroom

Technology advances

Video hearings / prisoners to and from court

Are courts swifter

Leveson

Legal Aid....effect on justice / fairness

Legal Charge

Probation service

Are courts more just

Morale

Lower morale, effect upon work?

Your advice

Profession

Preamble:

The purpose of the study is to elicit the experiences of advocates appearing in the Criminal Courts in a period of financial cutbacks. The study will also seek the views of advocates in respect of the efficiency of the criminal courts in a time of financial cutback.

Volume of work

Reason

Cut Backs

Efficiencies

Good aspects / bad aspects

Perverse consequences

As said. Efficiency in the courts. Less delay. Background of austerity.

Changes, volume of work, diversion, fall in crime rate? Seen to stop delay, efficiency, IT, Culture in the courts, working, perverse consequences, seamless, TSJ, Swifter, Surer, Volume of work. More just?

TSJ

TCJS

SS

Drive to efficiency...good aspects, bad aspects

Legal aid, effect on the firm, effect on the defendant. Represent themselves.

More cases retained in mags courts

Appendix G: Ethics Approval Letter



July 22nd 2015

Charles Niklas-Carter – Professional Doctorate

Dear Charles,

Study Title:	The experiences of advocates in respect of the efficiency of the criminal courts in a period of financial cutbacks.
Ethics Committee reference:	14/15:60

Thank you for submitting your documents for ethical review. The Ethics Committee was content to grant a favourable ethical opinion of the above research on the basis described in the application form, protocol and supporting documentation, revised in the light of any conditions set, subject to the general conditions set out in the attached document.

You must also attend to the following minor conditions:

- Strengthen guarantee of anonymity/mitigate potential risks to anonymity.
- Demonstrate awareness of issues relating to confirmation bias (of researcher's opinion) and action to mitigate this
- Strengthen the understanding and awareness of reputational issues.

There is no need to submit any further evidence to the Ethics Committee; the favourable opinion has been granted with the assumption of compliance

It is the supervisor's responsibility to oversee that these conditions are fulfilled.

The favourable opinion of the EC does not grant permission or approval to undertake the research. Management permission or approval must be obtained from any host organisation, including University of Portsmouth, prior to the start of the study.

Appendix H: Choice of Lawyers as Participants

Initially consideration had been given to approaching judges, court officials, and the CPS in addition to lawyers. However, preliminary sounding out of potential sources was not encouraging. Judges I met made it clear that our interviews were strictly off the record and strongly indicated that unbridled access to the judiciary would not be granted. Court clerks, often previously outspoken and forthright, stated that in the present climate access to them would not be allowed. In any event, because of the 'political climate' they would not feel comfortable answering questions which, for them, would be 'loaded'. The CPS I had already approached in respect of the Small Study and their response was to ultimately ignore every polite request. It was clear that the CPS did not want to cooperate with any project that held the prospect of possible criticism of that body.

I was not too dismayed in having to rely upon lawyers as the first source of material. The lawyers would have day to day experience of what was happening in the courts. They would be independent: of the Lord Chancellor, the local court body, and CPS politics. They would also have the requisite knowledge to be aware of technical and legal changes that affect court processes and efficiency. The self-employed barrister or partner solicitor were much freer to 'tell it how it was' rather than a court official, or employed lawyer or administrator nominated by the CPS, to answer questions. Such fettered employed persons would be constantly looking over their shoulder at the spectre of their disapproving bosses. Consideration of professional identity influences also made the choice of independent lawyers a sensible one. They were, for example, likely to be much freer of the influences of a lawyer sub culture than an employed CPS lawyer (see Appendix E).

Appendix I: Introductory Letter



**Institute of Criminal
Justice Studies
University of Portsmouth
Ravelin House
Museum Road
Portsmouth PO1 2QQ
T: +44(0)23 9284 3818**

Dear...

I am writing to you as Head of [] Chambers / Managing Partner of [] to request permission to invite members of Chambers / Solicitors of your firm to take part in a research study. I am a student currently enrolled in the Doctorate of Criminal Justice programme at the University of Portsmouth, and I am in the process of researching my Doctoral Thesis. I am a retired criminal advocate. The research will be sponsored by the University of Portsmouth which will provide proper supervision and insurance.

The study is entitled: 'The experiences of advocates in respect of the efficiency of the criminal courts in a period of financial cutbacks'

The study will examine the experiences of various criminal law practitioners in an attempt to understand better what is happening in the courts in this time of financial cutbacks. Little is currently known about the impact that efficiency programmes are having on the business of the courts.

The proposed research has the potential to make a valuable contribution to academic knowledge in a field which has not been subject to the rigours of academic research and investigation. The government spends many millions in sustaining the criminal court system and there is currently much dispute as to the wisdom of that spending and the efficiency of the system both in general and in part.

Very importantly, the study will hopefully articulate the thoughts and experiences of advocates in a difficult time for both the courts and the legal professions.

I hope to interview several Criminal Barristers / Criminal Lawyers of the Chambers / Firm of at least five years call / experience. The intended research method involves semi structured qualitative interviews of about one hour duration. For the convenience of the participants and with your permission it is intended to interview the participants in Chambers / the office. The collection of data will be in accord with the British Society of Criminology Code for Ethics and the University of Portsmouth Ethics Policy, and the keeping of the data will comply with the requirements of the Data Protection Act 1998.

It must be emphasised that two prime considerations apply to the research, namely those of anonymity and confidentiality. There will be no risk taken that may indicate the identity of either a participant or of Chambers. Of course, some participants may wish to be associated with their views. However, such attribution will only take place with your further permission.

If you require further information in respect of this research project then please contact the researcher Charles M Nicklas-Carter directly by e mail at charles.nicklas-carter@myport.ac.uk

Appendix J: Participant Information Sheet



Institute of Criminal
Justice Studies
University of Portsmouth
Ravelin House
Museum Road
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T: +44(0)23 9284 3818

Study Title: The experiences of advocates in respect of the efficiency of the criminal courts in a period of financial cutbacks.

Researcher: Charles M Nicklas-Carter

I would like to invite you to take part my research study. Before you decide I would like you to understand why the research is being done and what it would involve for you. Talk to others about the study if you wish. Ask me if there is anything that is not clear.

What is the purpose of the study?

The purpose of the study is to elicit the experiences of advocates appearing in the criminal courts in a period of financial cutbacks. The study will centre upon possible recent changes in the efficiency and efficacy of the courts.

Why have I been invited?

You have been asked to participate in this study because you are an advocate appearing in the criminal courts.

Do I have to take part?

Taking part is entirely voluntary. It is up to you to decide whether or not to join the study.

I will describe the study and go through this information sheet. If you agree to take part, I will then ask you to sign a consent form.

What will happen to me if I take part?

The study will involve approximately a one hour interview which will be tape recorded. No personal information will be tape recorded but such information will be taken before the commencement of the interview. This personal information will be coded and anonymised.

The interview will be semi structured, some central questions will be asked but there is scope for you to range freely over the topics.

The research will mean the interviewing of several advocates and that element of field research should last approximately two months.

What will I have to do?

You will, with your consent, be interviewed at your Chambers / Office. No pre reading or particular preparation is required.

What are the possible disadvantages and risks of taking part?

Every precaution will be taken to ensure anonymity and confidentiality.

What are the possible benefits of taking part?

To make your views known on some important issues impinging upon the criminal courts and the criminal court processes. There is a chance that the project could possibly help in leading to outcomes such as a better understanding of court efficiency and organisation in a time of financial cutback.

Will my taking part in the study be kept confidential?

As stated above, every precaution will be taken to ensure anonymity and confidentiality. All personal data will be coded and anonymised.

However, you may wish to be named and associated with your data – with your consent, of course. This can be the case with expert interviews or research which aims to give people ‘a voice’. Provision for this is made in the consent form which I would advise you to read thoroughly before consenting to its individual elements. You may, for example, not wish to have your name associated with your data yet be willing to be quoted verbatim. However, such attribution of opinions and views will require the further consent of your Head of Chambers / Managing Partner.

Data may also be looked at by authorised people to check that the study is being carried out correctly. All will have a duty of confidentiality to you as a research participant.

It is possible that the data may be retained for use in future studies. Identifiable data may be seen by supervisors.

The collection of sensitive data or personal data will be coded. The raw data will be used solely for the analytical purposes for which it was collected and kept for no longer than is necessary for the research. Recordings and electronic data will be kept on a password protected hard drive of a desk top computer. The identifiable data will be retained for not more than 6 years from the completion of the thesis and will then be destroyed. To ensure subsequent destruction of data the drive will be electronically wiped clean.

Information and data stored in paper files will be stored in a locked cabinet and subsequently shredded and burned to ensure destruction.

You will have the right to check the accuracy of data held about you and correct any errors.

What will happen if I don't want to carry on with the study?

You can indeed withdraw at any time but once the interview data has been analysed it might prove difficult or impossible to withdraw your own personal contribution. All participants will be written to when the interview data has been analysed.

What if there is a problem?

If you have a concern about any aspect of this study, you should ask to speak to the researcher or their supervisor, who will do their best to answer your questions. The researcher can be reached by e mail at charles.nicklas-carter@myport.ac.uk and if need be I will direct you to the supervisor of the study: Dr Jane Creaton, Associate Dean (Academic) & Principal Lecturer in Criminal Law and Criminal Justice, who is contactable at the address at the head of this letter or by e mail jane.creaton@port.ac.uk

If you remain unhappy and wish to complain formally, you can do this by contacting Phil Clements Head of Department, Institute of Criminal Justice Studies , University of Portsmouth Tel: +44 (0)23 9284 5069. E mail: phil.clements@port.ac.uk

What will happen to the results of the research study?

The results of the research will be submitted to the University as a thesis for the award of a Professional Doctorate in Criminal Justice. If you request a copy of the summary of the findings the researcher will make such a copy available to you free of charge.

It is possible that the results of the research may be published. It is also possible that the research may in time form the foundation and / or part of a larger study.

Who is organising and funding the research?

The research will be sponsored by the University of Portsmouth which will provide proper supervision and insurance.

Who has reviewed the study?

Research in the University of Portsmouth is looked at by independent group of people, called a Research Ethics Committee, to protect your interests. This study has been reviewed and given a favourable opinion by the Faculty Research Ethics Committee.'

Further information and contact details

If you require further information in respect of this research project then please contact the researcher Charles M Nicklas-Carter by e mail at charles.nicklas-carter@myport.ac.uk

Concluding statement

Thank you for taking the time to read the information sheet regardless of your decision to participate or not. If you do decide to participate you will be given a copy of the information sheet to keep and your consent will be sought.

Appendix K: Consent Form



**University of
Portsmouth**

Institute of Criminal
Justice Studies
University of Portsmouth
Ravelin House
Museum Road
Portsmouth PO1 2QQ
T: +44(0)23 9284 3818

NB: If you require further information or explanation before completing the form please contact the Researcher: C M Nicklas-Carter charles.nicklas-carter@myport.ac.uk

Alternatively, the Researcher's supervisor details are: Dr Jane Creaton, Associate Dean (Academic) & Principal Lecturer in Criminal Law and Criminal Justice, who is contactable at the address at the head of this letter or by e mail at jane.creaton@port.ac.uk

Study Title: The experiences of advocates in respect of the efficiency of the criminal courts in a period of financial cutbacks.

Name of Researcher:C M Nicklas-Carter.....
box

Please initial

1. I confirm that I have read and understand the information sheet dated.. for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.

2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason, up to the point when the data are analysed

3. I understand that data collected during the study, may be looked at by individuals the University of Portsmouth,, or from regulatory authorities. I give permission for these individuals to have access to my data

4 I agree to my interview being audio recorded

☐

5 I agree to being quoted verbatim

☐

6 I agree to the data I contribute being retained for future, Research Ethics Committee approved research

☐

7. I agree to being a named participant and quoted by name.

☐

8. I agree to take part in the above study.

☐

Name of Participant:

Date:

Signature:

Name of Person taking consent:

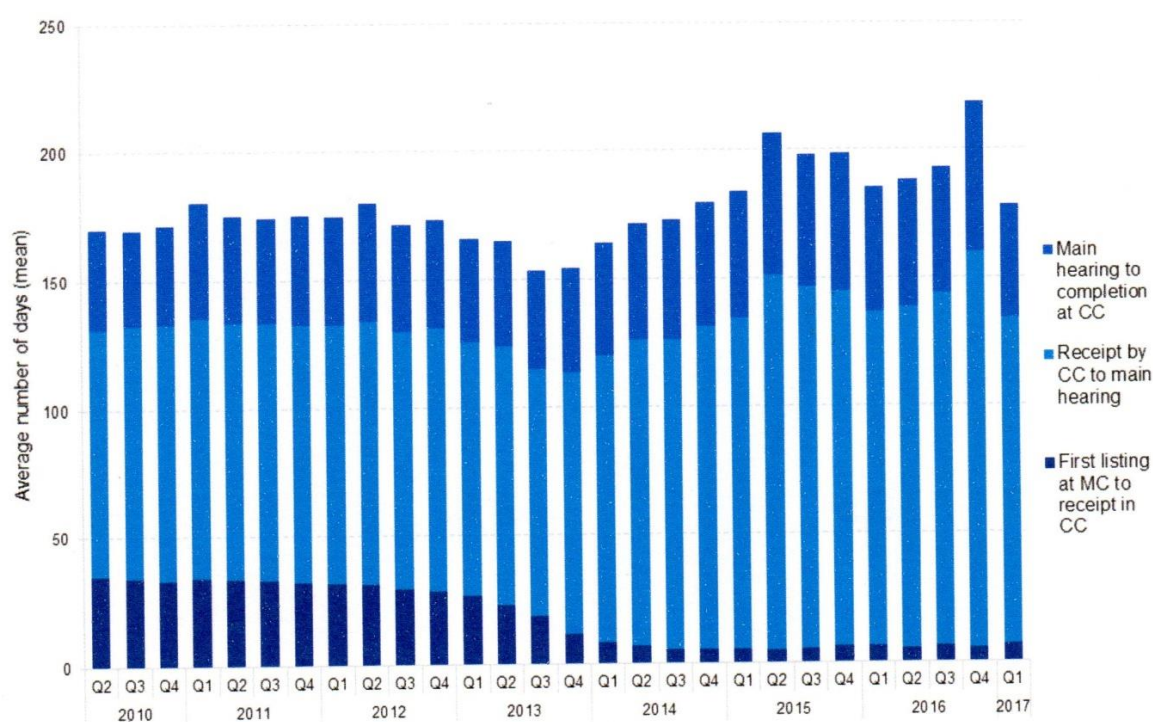
Date:

Signature:

When completed: 1 for participant; 1 for researcher's file.

Appendix L: Listing to Completion Times

Figure 22: Average number of days (mean) from first listing in the magistrates' courts to completion in the Crown Court, for Crown Court criminal cases, Q2 2010 to Q1 2017 (Source: Table T4)



Source: Criminal court statistics quarterly, England and Wales, January to March 2017 (MOJ 2017b)

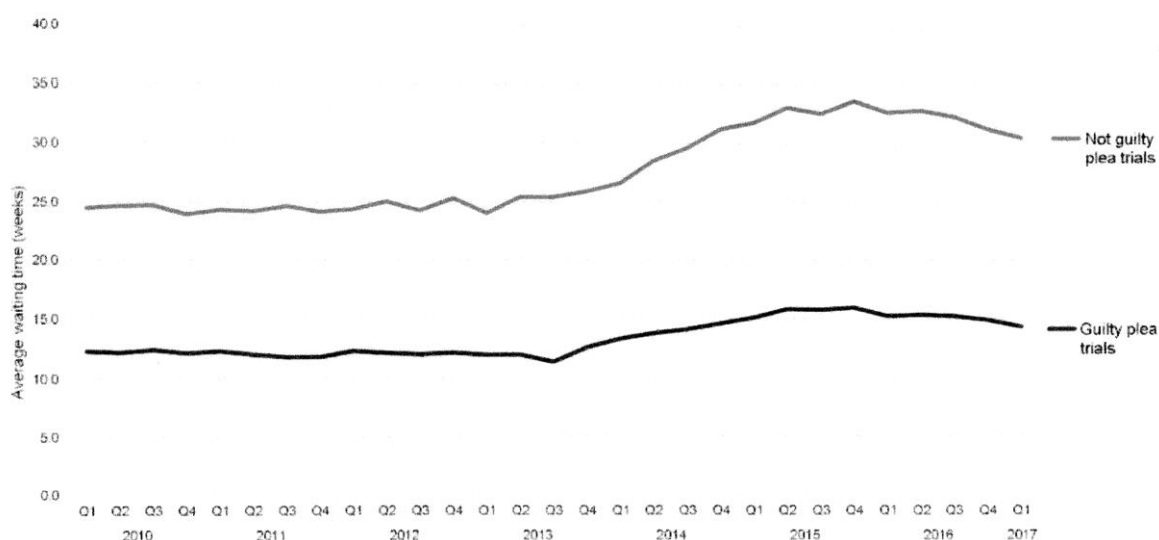
The Appendix shows completion time. From 2013 the completion times have shown an upward trend. During the same period the abolition of committals has led to a dramatic reduction in the time cases remain in the Magistrates' Court before being sent to the Crown Court (the dark blue at the bottom of the columns). Without the abolition of committals the time to completion upward trend from 2013 would have been even greater. Accordingly, these factors reflect a significant fall in the technical efficiency of the Crown Court. Assuming that a reduction in waiting times actually reduces delays, then considering the commitment the government and the MOJ have made in reducing such

time, this record of coping with 'delays' is not impressive. (See Appendix N for a discussion on Delay).

In spite of the rising trend in waiting times since 2000, in 2016 the number of cases outstanding fell in the Crown Court and there was a slight decrease in waiting times. However, it is important to note that the marginal increase in 'performance' was not due to increased efficiency of the courts but to the fact that court workload fell with receipts being less than the disposal rate. Indeed, the disposal rate itself was falling showing a likely fall in technical efficiency.

Appendix M: Waiting Time in the Crown Court

Figure 17: Average waiting time in Crown Court by plea, Q1 2010 to Q1 2017 (Source: Table C6)



Average waiting times at the Crown Court (Figure 17)

Source: Criminal court statistics quarterly, England and Wales, January to March 2017 (MOJ 2017b)

Average waiting time for all trial cases increased between 2013 and 2015, but has recently been followed by a small decrease between 2015 and 2016, decreasing by 0.5 weeks to 15.1 weeks for guilty plea trials in 2016 and by 0.4 weeks to 32.3 weeks for not guilty plea trials. Waiting times have continued to decrease in the last quarter; since Q4 2016 the average waiting time for guilty plea trials has decreased by 0.6 weeks to 14.3 weeks in Q1 2017 and by 0.8 weeks to 30.5 weeks for not guilty plea trials.

The fall in waiting times is not impressive being only 1.2% for not guilty trials. This is despite a significant fall in the number of cases received in the Crown Court over the same period. The number of receipts in 2016 was only 117,200, a fall of 10% from 2015, and the lowest figure since 2000. All this indicates that the technical efficiency of the courts has duly fallen during 2016.

Appendix N: The Concept of Delay

The MOJ have nowhere defined the concept of delay that they use. There seems to be an assumption that the longer the court process the greater is the delay.

There is little or no analysis of the causes of delay in governmental thinking. The putative causes seem to be limited to the complexity and bureaucracy of court processes (WPSS 2012, p.16) and to outdated working practices (MOJ 2014c, p.5)

Elsewhere, court delay has been defined as ‘the amount of time between the commencement and the conclusion of court proceedings which exceeds the time necessarily spent in the preparation of a case for trial, the conduct of its hearing and the determination of its final outcome’ (Brebner & Foster 1994, p.102; Callinan 2002, p.2).

Essentially it must be remembered that ‘one of the goals of the court system is to ensure that the period between the initiation and finalisation of court proceedings is as short as possible, without compromising the quality of justice provided’ (Callinan 2002, p.2).

The no adjournment culture may have shortened waiting times. The question arises: has this succeeded in reducing delay? The question is not as rhetorical as it may first seem.

Simplistically, it may be assumed that speeding up the court process will reduce delay.

This is not necessarily so. If court schedules are inflexible and shortened the result may be that many cases are dropped because the required processes cannot be completed within the time frame. The no adjournment culture and the strict time management imposed by the court may lead to some reduction in potential delay for some straightforward cases.

But because of the strict no adjournment culture it is very likely that the *necessary* time to complete processes has not been provided for in many cases.

The evidence from the participants regarding the no adjournment culture is that, *no distinction is made between the simple and the complicated [case]. RF*

Thus although waiting time may have been reduced in the magistrates' court no account has been taken of the complexity of cases. Thus cutting delay by reducing waiting times may not have been achieved because the essential *necessary* time to adequately prepare cases has not been made available. As a result, potentially good cases are forced to be abandoned or discontinued.

Much work has been done on the concept and measurement of delay in the courts by Brebner & Foster (1994) and also Monash University. The comprehensive project by Monash came to the general conclusion that "Timeliness is a complex...concept" (Sourdin 2013, p.11).

It has therefore become apparent that court "delay" is complex and a difficult attribute to measure. However, the MOJ seems to have adopted a naïve concept of delay: this has resulted in the adoption of an over strict, crude, and mainly ineffectual policy of case management.

It is ineffectual because no matter how many cases it speeds up it runs counter to the *raison d'être* of the whole court process, encapsulated in the condition of not 'compromising the quality of justice provided.'

References

Brebner D and Foster R (1994). The Development of National Objectives or Goals for the Disposition of Cases in the Higher Courts. 4 *Journal of Judicial Administration*, 100, p 103.

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Sourdin, T. (2013, October 1). The Timeliness Project: Background Report. Retrieved from <https://ssrn.com/abstract=2713502>

WPSS (2012). White Paper Swift and Sure. Gov.uk. Retrieved from <https://www.gov.uk/government/publications/swift-and-sure-justice>

Appendix O: Disclosure Developments

The participants provided myriad complaints concerning the inadequacy, the standards, and even the total absence of disclosure. Their concerns regarding CPS and police disclosure have been validated by other events and sources. The press in January 2018 reported that 'All current rape and serious sexual assault cases in England and Wales are to be reviewed "as a matter of urgency" to ensure evidence has been disclosed. Director of Public Prosecutions Alison Saunders warned the review could see "a number of cases" dropped' (Coleman 2018)

This action was in response to the collapse of several rape cases because evidence had not been disclosed to the defence. The same BBC report stated that in January 2017, 'a rape charge against Oxford University student Oliver Mears was dropped on the eve of his trial, after a diary which supported his case was uncovered. And in December, the trial of Liam Allan, who faced 12 counts of rape and sexual assault, was dropped when it emerged evidence on a computer disc - which police had looked through - showed messages from the alleged victim pestering him for "casual sex"' (Coleman 2018).

The concern had been heightened by the results of a BBC survey of nearly 1300 lawyers. The results were damning. 97 per cent encountered disclosure of evidence failings during the last 12 months and more than half (55%) encountered these problems every day or every week. 78% said the failures resulted in delayed the trial and 85% said the failures had placed the defence under unreasonable logistical or time pressure. The consequences of the disclosure failings were more than inconvenience and delay. 56% of

respondents said the failures had caused a case to collapse and 44% said the failures have resulted in a denial of justice (LCCSA 2018)

Disclosure failures should not have come as a great surprise. In July 2017 the CPS inspectorate reported on the disclosure of unused material by the police and the CPS. Unused material is material that the prosecution do not intend to use at a trial. However, such material should be examined to see if there is any evidential value in the material, especially if it supports the defence and undermines the prosecution case. The computer disc in the Allan case, *supra*, would have been counted as such unused material. There were found to be systematic failings by both the police and the CPS. That report echoed the fundamental principle that 'Disclosure is one of the cornerstones of the criminal justice system and disclosure of unused material is a key component of the investigative and prosecution process' (Criminal Justice Joint Inspection 2017). The report found that 'Police scheduling (the process of recording details of sensitive and non-sensitive material) is poor and this, in turn, is not being challenged by prosecutors. 22% of schedules were found to be wholly inadequate' but perhaps the major failings were saved for the CPS who were condemned for not rejecting substandard schedules from the police. A culture of acceptance prevailed in the CPS who failed to challenge the police. The report also noted that judges lacked confidence in the CPS's ability to manage the disclosure process.

The Report was so concerned that it put forward the following urgent measures:

There should be a **strict timetable** for change.

Immediately:

- all disclosure issues relating to unused material to be identified at the charging stage.

Within six months:

- the CPS to comply with the Attorney General's Guidelines on Disclosure, with an allocated prosecutor reviewing every defence statement and giving prompt guidance to police;
- police forces to improve supervision of unused material;
- CPS Compliance and Assurance Team to begin dip sampling;
- all police forces to establish role of dedicated disclosure champion of senior rank;
- a system of sharing information between CPS Areas and Headquarters to monitor performance;
- CPS and police to develop effective communications processes.

Within 12 months:

- the College of Policing to introduce a disclosure training package;' (Criminal Justice Joint Inspection 2017).

The Crown Prosecution Service, the National Police Chiefs' Council (NPCC) and the College of Policing have launched an "improvement plan" to tackle the issue of unused material.

In response to these embarrassments, a meeting was held between the police and the CPS. The subsequent press release on January 18, 2018 quoted the DPP Alison Saunders who said,

The CPS and police have a vital role in ensuring there is a fair trial process in place to protect the public. Proper disclosure is a fundamental part of this.

The steps we have already taken, along with the measures we have announced today, are aimed at tackling the deep-rooted and systemic disclosure issues which are of great concern to us all.

Changes in society such as the vastly increasing use of social media and mobile phone messaging bring challenges that all parts of the criminal justice system, despite the resourcing challenges, must deal with. That's why last week I brought together senior figures from across the system to focus on the challenges and agree our plan of action.

I'm clear that we must make effective change happen quickly – and then keep driving these improvements in the months ahead.

Centring upon the issues raised by failed raped trials, she went on to say,

We are taking steps to identify any individual cases of concern as a matter of urgency. All cases are subject to regular and ongoing scrutiny, but senior prosecutors across England and Wales are currently assessing all live rape and serious sexual assault cases to check they are satisfied that disclosure obligations have been met.

Inevitably, bringing forward these case reviews means it is likely that there may be a number of cases which we will be stopping at around the same time.

The press release stated that among the measure announced are,

- Improving the CPS digital case management system to make it easier to deal with evidential material.
- Reviewing the police HOLMES computers system to ensure sensitive material is stored and disclosed properly.
- Refreshing the CPS Disclosure Manual. An updated version to assist both the police and prosecutors in meeting their obligations will be published shortly.
- Establishing CPS disclosure champions to give advice and support in area such as training for prosecutors.

On the 22nd February 2018 the Justice Select Committee opened an inquiry into the disclosure of evidence. The terms of reference being: This inquiry aims to investigate disclosure procedures fully to ensure they are fit for purpose and that the steps proposed to address existing issues are sufficient to resolve them. The Committee's findings will feed into the Attorney General's ongoing review.

References

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